85-1448

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, MICHAEL SCIARRA, President, JOSEPH SHERIDAN, Vice-President, JOSEPHINE PROVENZANO, Sec-Treasurer, STANLEY JARONKO, Trustee, and JOSEPH SHERIDAN, JOSEPHINE PROVENZANO, MICHAEL SCIARRA, STANLEY JARONKO,

Petitioners (Appellants Below),

v.

UNITED STATES OF AMERICA,

Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "preponderance of the evidence" standard of proof is sufficient to sustain a verdict in a civil action brought pursuant to the Racketeer Influenced and Corrupt Organization Act [RICO], 18 U.S.C. § 1961 *et seq.*, a question left open by this Court in *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, 473 U.S. ____, 87 L.Ed.2d 346, 105 S.Ct. 3291 (1985).

2. Whether the alleged extortion of intangible rights guaranteed to union members by the Labor Management Reporting and Disclosure Act [LMRDA], "Bill of Rights," 29 U.S.C. § 411, constitutes a violation of the Hobbs Act, 18 U.S.C. § 1951, and thus a chargeable predicate offense under RICO.

3. Whether union officers' lawful appointment of convicted felons to union office, in compliance with the then-applicable provision of LMRDA, 29 U.S.C. § 504, can constitute a violation of the Hobbs Act, 18 U.S.C. § 1951.

4. Whether union officers' violation (*arguendo*) of LMRDA, 29 U.S.C. § 501(a), in failing to take affirmative action to suspend the union's payments of accrued salary and/or pension bonus monies to an individual convicted of union-related crimes, can constitute a violation of the Hobbs Act, 18 U.S.C. § 1951.

PARTIES

The parties to this action in the United States Court of Appeals for the Third Circuit were Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Salvatore Provenzano, President (and individually), Joseph Sheridan, Vice-President (and individually), Josephine Provenzano [Septembre], Sec-Treasurer (and individually), J.W. Dildine, Recording Secretary (and individually), Thomas Reynolds, Sr., Trustee (and individually), Stanley Jaronko, Trustee (and individually); Trucking Employees of North Jersey Welfare Fund, Inc., Salvatore Provenzano, Employee Trustee; Local 560 Officers and Employees Severance Pay Plan, Salvatore Provenzano, Trustee and Administrator, Josephine P. Septembre, Trustee and Administrator; Anthony Provenzano, individually; Nunzio Provenzano, individually; Stephen Andretta, individually; Thomas Andretta, individually; Gabriel Briguglio, individually; and Michael Sciarra, individually (and as Trustee of Local 560, although not so denominated), appellants below; United States of America, appellee below.

The petitioners on this petition for writ of certiorari are Local 560 and its four remaining Executive Board members, Michael Sciarra, former Trustee, now President, Joseph Sheridan, Vice-President, Josephine Provenzano, Sec-Treasurer, and Stanley Jaronko, Trustee.

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IN THE

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OCTOBER TERM, 1985

No. 85-

LOCAL 560 of the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America,
MICHAEL SCIARRA, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO, Sec-Treasurer,
STANLEY JARONKO, Trustee,
and
JOSEPH SHERIDAN,
JOSEPHINE PROVENZANO,
MICHAEL SCIARRA,
STANLEY JARONKO,
Petitioners (Appellants Below),

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS IN COURTS BELOW

The opinion of the United States District Court for the District of New Jersey, denying petitioners' motion for dismissal of paragraph 12(a) of the Complaint for failure

to state a cause of action, is reported at *U.S. v. Local 560, etc. et al.*, 550 F. Supp. 511 (D.N.J. 1982) (App. A).

The opinion of the United States District Court for the District of New Jersey, with findings of fact and conclusions of law following a 51-day bench trial, is reported at *U.S. v. Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, et al.*, 581 F. Supp. 279 (D.N.J. 1984) (App. B).

The opinion of the United States Court of Appeals for the Third Circuit, affirming the verdict and judgment of the District Court, is reported at *U.S. v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, et al.*, 780 F.2d 267 (3rd Cir. 1985) (App. D).

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in this case was dated and entered December 26, 1985.

The order of the United States Court of Appeals for the Third Circuit in this case, denying petition for rehearing (with suggestion for rehearing *en banc*), was dated and entered January 23, 1986.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1254, to review the judgment of the Court of Appeals, by writ of certiorari granted upon timely petition of a party to a civil action, after rendering of judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

Title 18, United States Code, Section 2

Title 18, United States Code, Section 1962(a)-(d)

Title 29, United States Code, Section 411(a)(1) & (2)

Title 29, United States Code, Section 501(a)

Title 29, United States Code, Section 504

These statutes are set forth in their entirety at Appendix I, as provided in S.C.R. 21.1(f).

STATEMENT OF THE CASE

In this unique case, the United States sought, and won, the ouster of the entire Executive Board of Local 560 of the International Brotherhood of Teamsters, the relief granted by the District Court on its finding that the union's members have been extorted of their LMRDA rights and are fearful of their past and/or present leaders. Not one single union member was called in the United States' case in chief to give testimony, evidence or opinions concerning this ultimate issue of fact or the desirability of the court's remedy. Instead, the United States presented evidence of illegal activities on the part of *past* union officers, newspaper articles to prove the past officers' bad reputation (later ruled inadmissible by the Court of Appeals), the testimony of a Special Agent of the Department of Labor concerning his interviews of undisclosed confidential informants (also ruled inadmissible by the Court of Appeals), and the testimony of an expert in the field of labor law that it was "incomprehensible" to him that the union members were not fearful – a lay psychiatric opinion which carried the day. This expert's opinion, it

should be noted, was based on little more than his reading of the Complaint and his speculation concerning union members' expected reactions to past officers' criminal convictions, in view of the Court of Appeals' rulings concerning the newspaper articles and the special agent's testimony. (At trial the expert relied heavily upon his assumptions concerning the reputations of the Provenzano Group members, which assumptions were no longer based on any evidence at all.)

This case began with the filing of a verified complaint by the United States on March 19, 1982, predicated upon the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. § 1961 *et seq.* The named defendants were Local 560 of the International Brotherhood of Teamsters together with its Executive Board members; its Pension and Welfare Fund (Trucking Employees of North Jersey Welfare Fund Inc.); its Officer & Employee Severance Pay Plan; five persons comprising part of the so-called "Provenzano Group," Anthony and Nunzio Provenzano being former presidents of the Local, Stephen Andretta being a former business agent, Thomas Andretta and Gabriel Briguglio having never held any office or position with Local 560; and all of the Executive Board members individually.

The complaint alleged that Anthony Provenzano was the leader of the Provenzano Group, which included at various times the defendants specified above as well as other individuals, all now incarcerated, dead, or long gone from the union. None of the Executive Board members of Local 560 were alleged to be members of the Provenano Group. The Complaint alleged that the Provenzano Group, beginning in the late 1950's, had "infiltrated, dominated and exploited" Local 560, which together with its Severance Pay Plan and Welfare Fund Plan were

denominated the "Local 560 Enterprise," thereby rendering it a "captive labor organization."

Paragraph 12(a) of the Complaint charged that the Provenzano Group, as principals, "aided and abetted at various times by past and present members of the Executive Board," unlawfully acquired and maintained an interest in and control of the Local 560 Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b). Twenty-five [later twenty-eight] separate acts were listed which were claimed to constitute extortionate acts inducing the members of Local 560 to surrender their LMRDA rights, 29 U.S.C. § 411(a)(1) & (2). These extortionate acts were charged as Hobbs Act violations, 18 U.S.C. § 1951.

Paragraph 12(b) of the Complaint charged that the same Provenzano Group principals and Executive Board aiders and abettors conducted and participated in the affairs of the Local 560 Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Five [later six] specific acts of racketeering activity were alleged.

The Complaint also alleged that all of the defendants had conspired to violate § 1962(b) and § 1962(c), in violation of 18 U.S.C. § 1962(d).

Plaintiff United States requested that the Court restrain the Local 560 Executive Board members, Salvtore Provenzano (then-President), Joseph Sheridan (Vice-President), Josephine Provenzano (Secretary-Treasurer), J.W. Dildine (then-Recording Secretary), Thomas Reynolds, Sr. (then-Trustee), Michael Sciarra (then-Trustee and now President), and Stanley Jaronko (Trustee), from acting in any official capacity on behalf of Local 560; restrain the

"Provenzano Group" defendants, Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta and Gabriel Briguglio, from having any dealings with any officers or employees of Local 560; order the appointment of a trustee to exercise the duties of the Excutive Board for an unspecified period of time (presumptively eighteen months under the District Court's opinion, App. B), at the conclusion of which a general election of new officers would be held under certain terms and conditions; and prohibit all the individual defendants from having any future dealings with Local 560 after such election.

Prior to trial, the United States District Court for the District of New Jersey denied the petitioners' motion to dismiss Paragraph 12(a) of the Complaint for failure to state a cause of action. (App. A) Individual "Provenzano Group" defendants Anthony Provenzano, Nunzio Provenzano and Thomas Andretta, all in prison, entered into consent judgments barring them from any future dealings with Local 560 or its Pension and Welfare Fund.

The case proceeded to trial before the Hon. Harold A. Ackerman, without a jury, on fifty-one consecutive days between January 25 and May 17, 1983. The defendants who participated in the trial were Local 560 and its Executive Board members, the petitioners herein, as well as the Trucking Employees of North Jesey Welfare Fund, Inc., and "Provenzano Group" defendants Stephen Andretta and Salvatore Briguglio, the latter two acting *pro se*. On February 8, 1984 the District Court issued a lengthy opinion (App. B) followed by a judgment order (App. C), granting most of the relief sought by the United States but staying implementation of the order pending appeal.

The District Court's factual analysis, recited with approval by the Third Circuit in its opinion affirming the

judgment on December 26, 1985 (App. D), concentrated on the misdeeds of the "Provenzano Group" defendants and then strained to include in its sweep the Executive Board of Local 560. The Court found that between the late 1940's and the time of trial, Anthony Provenzano was the leader of a group of individuals, the so-called "Provenzano Group," associated together as an enterprise, 18 U.S.C. § 1961(4). The Court further found that from the late 1950's into the 1970's, Anthony Provenzano ran the union "whether in or out of prison or office," and that his brothers Sam and Nunzio Provenzano "played musical chairs in minding the store for Tony to satisfy the technical requirements of the law." (App. B) The Court detailed the "pattern of criminal and other improper acts" engaged in by the Provenzano Group, the object of which was to gain control over and to exploit the Local 560 Enterprise. (App. B) The conclusion (scores of pages later): a finding that the necessary result of these acts was the extortion of LMRDA rights of Local 560 members, who must necessarily be afraid of Provenzano Group members and associates because "it is beyond belief that 10,000 members would sit by and watch these things done and never utter a peep." (App. D) [1]

[1]This was the testimony of the expert witness noted earlier, Professor Clyde Summers, an educator in the area of Labor Law. He opined that "a significant proportion of Local 560's rank and file were induced by fear of the Provenzano Group [not the Executive Board members] to surrender their membership rights." (App. D at ____) This homemade psychological analysis, clearly outside the area of Summers' expertise, was based on his inability to think of any reason other than fear which would explain the memberships failure to protest the various acts of the Provenzano Group members – assuming they knew about them. The Circuit Court agreed with Professor Summers on the ground that "[t]here seems to be no other plausible explanation." (App. D at ____) Other plausible explanations were in fact given by the defendants' expert witnesses, whose testimony was not rejected, discounted, or discredited; it was just ignored.

The major problem faced by the District Court in its factfinding: having found at lavish length that the members of the Provenzano Group were guilty of conduct constituting Hobbs Act violations, specifically, murder and extortion of union members' LMRDA rights, how to find the current Executive Board members of Local 560 guilty as well – most of whom were not in office during the relevant time periods of the alleged extortionate acts? (As noted, the Provenzano Group activities dated from the 1940's. Petitioners Joseph Sheridan and Josephine Provenzano were appointed to the Executive Board in 1978, petitioners Michael Sciarra and Stanley Jaronko were appointed in 1981.)

The Court found that the Board members were guilty of aiding and abetting the extortion of members' LMRDA rights, 18 U.S.C. § 2, by virtue of their "appointment and retention in ofice of certain officials of Local 560 and in their discharge of certain other duties," (App. A) later specified to consist of (once again) their appointment and retention in office of individuals having criminal records; expenditure of Local 560 assets in the payment of back salary and pension monies to Antony Provenzano after he had been incarcerated, notwithstanding the fact that the membership had voted to pay these monies; and their reckless indifference ot the persistent and systematic misconduct of fellow incumbent officers" with respect to (once again) unsuitable appointments to office, permitting known criminals to have access to the union's offices, and (once again) a pattern of non-beneficial expenditures of Local 560 assets to pay back salary and pension monies to Anthony Provenzano. As the Court of Appeals summed up the total case against these petitioners, the sole remaining members of the Executive Board:

> . . . Michael Sciarra and Stanley Jaronko, the most recent members of the Executive Board, aided and abetted in at least two predicate Hobbs Act extortions. For example, Antony Provenzano's pension payments, which represented a Hobbs Act extortion, extended through 1981. Each Executive Board member, *by not objecting to* these payments which did not benefit the union, necessarily aided and abetted in the extortion. During that time period, both Sciarra and Jaronko were on the Executive Board.
>
> In addition, in 1981, the Executive Board appointed Robert Luizzi to the position of Business Agent – notwithsanding Luizzi's criminal record. The district court held that Luizzi's appointment, and similar appointments, also constituted part and parcel of the extortion of membership rights under the Hobbs Act. Further, in 1981, the Executive Board refused to remove Nunzio Provenzano from office, despite the fact that he had been convicted in the City-Man case. As noted, during this period, the four members of the Executive Board who the defendants claim did not aid and abet the extortionate activities found by the district court, were active members of the Board.
>
> Thus, each individual Executive Board member has aided and abetted in at least two predicate acts . . . .

(App. C emphasis supplied).

None of these acts dsignated by the Court of Appeals is unlawful. The appointment of Luizzi as business agent and the retention of Nunzio Provenzano in office were in full compliance with LMRDA, 29 U.S.C. 504 (App. I)

and the failure to protest continuing payment of salary and bonus monies to Anthony Provenzano was *at best* a violation of the fiduciary duties imposed by LMRDA, 29 U.S.C. 501(a), not a crime.

But on this evidence the Executive Board petitioners were found to have aided and abetted Hobbs Act violations, and as "racketeers" were ordered to surrender their offices in Local 560.

Petitioners urge this Court to read the opinions of the courts below (App. B and C), which demonstrate – as no petition with a 30-page limitation could ever do – that the Executive Board defendants simply "went down with" the Provenzano Group defendants, in a fashion which cannot withstand factual or legal analysis.

ARGUMENT

I.

This case presents a question of enormous importance for the federal judicial system in this country: the standard of proof to be applied in civil actions brought pursuant to § 1964 of the Rocketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. § 1961 *et seq.* [RICO]. The statute itself is conspicuously silent on this point, and it is widely agreed that its legislative history does little to resolve the question. *See* Towers, *Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance*? The National Law Journal, Dec. 2, 1985 at 26, Col. 1; Strafer, Massumi & Skolnick, *Civil RICO in the Public Interset; Everybody's Darling,* 19 Am.Crim. L. Rev. 655, 715 (1982). *See generally Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *aff'd,* ____ U.S. ____, 105 S.Ct. 3291, 878 L.Ed.2d 437 (1985) ("the

legislative history includes relatively little material on RICO's private civil remedy"); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (referring to "[t]he clanging silence of the legislative history"). This legislative omission has not been cured by the reported decisions discussing the burden of proof in civil RICO actions, which are few in number and limited in analysis. Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* The National Law Journal, Oct. 10, 1983, at 3, Col. 3. *See, e.g., United States v. Cappetto,* 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2 395 (1975). This question must be answered in the near future, and this case provides a proper vehicle for doing so.

RICO was enacted in 1970 to combat organized crime. *Russello v. United States,* 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26 (1983). During the first half of the ensuing decade, little use was made of its unique criminal and civil provisions. *See* 1 K. Brickey, Corporate Criminal Liability, § 7:01 at 230 n.5 (1984) ("[p]rior to 1975 there were only six reported RICO [criminal] cases"); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; "Everybody's Darling,"* 19 Am.Crim.L. Rev. 656 (1982) ("For years, this provision remained a wallflower, but recently, use of the civil provision has slowly begun to pick up momentum."), *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, ____ n.1, 105 S.Ct. 3275, ("of 270 district court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's").

Since 1975, however, literally thousands of civil plaintiffs have discovered the advantages of casting their complaint in the form of a civil RICO action. *See* Towers,

Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance? The National Law Journal, Dec. 2, 1985 at 26 n.3. Given the liberal damages which can be recovered in a civil RICO action, there is no reason to believe that plaintiffs will not continue to bring civil RICO actions in ever-increasing numbers in the foreseeable future. *See* 18 U.S.C. § 1964 (c) ("[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee")' *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, ____, n.2, 105 S.Ct. 3275 ____ n.2, 87 L.Ed.2d 346, 376 n.2 (1985) (Powell, J., dissenting) ("RICO's provision for treble damages [constitutes] an enticing invitation to litigate [common law] claims in federal courts"). As Justice Marshall observed in his dissenting opinion in *Sedima:*

> In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can . . .

87 L.Ed.2d at 363-64.

Despite the large and ever-growing volume of civil RICO suits, the burden of proof required in these actions remains an open question. The confusion over this issue is due in part to the fact tht the decisions of this Court concerning evidentiary burdens in civil proceedings have not been entirely consistent. In *Addington v. Texas,* 441 U.S.

418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323, 329 (1979), the Court explained that:

> The function of a standard of proof . . . is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions . . ." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

The Court went on to say that the preponderance standard, which lies at one end of the evidentiary spectrum, is applied in

> the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance . . . The litigants thus share the risks of error in roughly equal fashion.

Id. The "reasonable doubt" standard, which occupies the other end of the spectrum, is applied in criminal cases, because

> the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.

Id. (Footnote omitted) Regarding the intermediate standard of "clear and convincing proof," the Court observed that:

> *One typical use of [it] is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.* The interests at

> stake in those cases are deemed to be more substantial than mere loss of money and *some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.* Similarly, this court has used the "clear, unequivocal and convincing" standard to protect particularly important individual interests in various civil cases.

Id. at 424, 60 L.Ed.2d at 330 (emphasis supplied). Although the Court's language discussing the "clear and convincing evidence" standard would seem to call for the use of that standard in civil RICO actions, where a plaintiff cannot recover unless the denfendant has been guilty of criminal misconduct, *see also Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("due process requires that the state support its allegations by at least clear and convincing evidence" in a proceeding initiated by the state to terminate the rights to natural parents to retain custody over their children), there is also support, as noted by the Court of Appeals in this case (App. D), for using the "preponderance of the evidence" standard. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983); *Steadman v. Securities and Exchange Comm'n,* 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981); *Vance v. Terrazas,* 444 U.S. 252 (1980), *S.E.C. v. C.M. Joiner Leasing Corp.* 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943); *United States v. Regan* 232 U.S. 37, 48-49, 34 S.Ct. 213, 58 L.Ed. 494 (1914) ("proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution").

Adding to the confusion, in *Sedima, S.P.R.L. v. Imrex Co., Inc.,* ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346, 356 (1985), although the Court specifically declined

to determine the relevant burden of proof in civil RICO actions, it seemed to suggest that the criminal standard might apply in private treble damage actions:

> . . . [R]equiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. *Finally, to the extent an action under* § 1964(c) might be considered quasi-criminal, requiring protections normally applicable to criminal proceedings, cf. One 1978 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.

(emphasis supp;lied as to last sentence).

The difficulty in determining the appropriate burden of proof, and thus the need for judicial guidance, is exacerbated by the unique nature of the RICO provisions. Although actions pursuant to 18 U.S.C. § 1964 are denominated as civil actions, in many ways they are more akin to criminal proceedings. The treble damageds allowed under § 1964(c) may be much higher in many cases than the fines authorized in criminal proceedings under the same statute. Moreover, defendants in a civil RICO action will be tarred with the stigma of being "racketeers" regardless of whether they have any affiliation with organized crime. Most importantly, however, there can be no civil liability under RICO *unless* the defendant has engaged in activity for which he could be held *criminally* liable under § 1962. *See* 18 U.S.C. § 1964(a) & (c). This

in itself sets RICO actions apart from other civil proceedings.

This court should act soon to clarify the burden of proof in civil RICO actions. Literally thousands of RICO actions are now approaching trial, *see* Towers, *Burden of Proof In RICO Actions: Does 'Sedima' Provide Guidance?* The National Law Journal, Dec. 2, 1985 at 26 § n.3, and more are being filed every day. Given the unique nature of the RICO statute, and the absence of any meaningful guidance in the legislative history, the district courts will undoubtedly arrive at different conclusions concerning the applicable burden of proof. *See United States v. Cappetto,* 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) (preponderance); Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* The National Law Journal, Oct. 10, 1983 at 21, Col. 1 (suggesting appropriateness of "clear and convincing evidence" standard for the requirement that a civil RICO plaintiff prove a "pattern of racketeering activity"); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: Everybody's Darling,* 19 Am.Crim.L.Rev. 655, 715-18 (1982) (arguing that a "clear and convincing" standard would be appropriate for all elements of a civil RICO action); *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482, 501 (2d Cir. 1984), *rev'd* 473 U.S. ____, 87 L.Ed.2d 346, 105 S.Ct 3291 (1985) (dictum) ("in the absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in proving [the defendant's] criminal conduct"). And even if a uniform rule should emerge, there is no guarantee that it will reflect the proper burden of proof to be applied in these cases. If the standard is too high, plaintiffs by the score will suffer as a result. If the standard is too low, hundreds, if not thousands, of defendants

will suffer unnecessary and improper exposure to potentially crushing awards of treble damages and the pejorative label of "racketeer."

Delay in determining the relevant burden of proof also works to the serious disadvantage of the federal judiciary. Ambiguity concerning one of the most fundamental legal questions in every RICO action encourages motions and appeals which will increase the congestion of the federal courts. Moreover, such basic uncertainty undermines the incentive to settle such cases out of court. How can parties evaluate their chances of success at trial when they do not even know what standard of proof will be required, the mere "preponderance of evidence" standard used in most civil actions, the stringent standard of "guilt beyond a reasonable doubt" applied in criminal actions, or some intermediate standard, perhaps "clear and convincing evidence"?

The case at bar presents an excellent opportunity to resolve this question in the near future. The issue is clearly presented, and has been properly preserved at every level of litigation. The case also provides a good vehicle for establishing guidelines because it presents the question addressed in the least virulent of civil actions — when no treble damages are sought. For these reasons, the court should grant certiorari in this case.

II.

Paragraph 12(a) of the Complaint filed in this case alleged that the defendants had unlawfully acquired and maintained, both directly and indirectly, an interest in and control of union Local 560, an "enterprise," through a pattern of racketeering activity in violation of § 1962(b) of the Racketeer Influenced and Corrupt Organization Act

of 1970, 18 U.S.C. § 1961 *et seq.* [RICO]. This racketeering activity allegedly involved murder and the systematic use of extortion, with the latter consisting of "the wrongful use of actual and threatened force, violence and fear of physical and economic injury in order to create within Local 560 a climate of intimation which induced the members thereof to consent to the surrender of certain valuable property in the form of their union rights as guaranteed by the provisions of Sections 157 and 411 of Title 29 of the United States Code." *United States v. Local 560, Int.; Bhd. of Teamsters,* 581 F.Supp. 279, 284 (D.N.J. 1984) (App. A) (quoting from the Complaint).

The conduct alleged in the compliant was clearly covered by the provisions of § 530 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C 401 *et seq.* [LMRDA],[2] which states in pertinent part that:

> It shall be unlawful for any person through the use of force or violence, or threat of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter.

A violation of § is not a predicate offense for purposes of establishing a RICO violation. *See* 18 U.S.C. 1961 (1). *Cf. United States v. Malizia,* 720 F.2d 744 (2d Cir. 1983)

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[2] *See United States v. Williams,* 624 F.2d 75 (9th Cir. 1980); *United States v. Kelly,* 545 F.2d 619 (8th Cir. 1976), *cert. denied,* 430 U.S. 933 (1977); *United States v. Roganovich,* 318 F.2d 167 (7th Cir.), *cert. denied,* 375 U.S. 911 (1963); *United States v. Bertucci,* 333 F.2d 292 (3d Cir.), *cert. denied,* 379 U.S. 839 (1964); *Tomko v. Hilbert,* 288 F.2d 625 (3d Cir. 1961).

(N.Y. Penal Law § 180.50 creates a misdemeanor which is not a RICO predicate crime).

Arguing that § 530 was the only provision of law prohibiting their alleged misconduct, the defendants filed a 12(b)(6) motion seeking dismissal of paragraph 12(a) of the complaint. This motion was denied on November 12, 1982, on the ground that the alleged extortion, if proved, constituted a violation of the Hobbs Act, 18 U.S.C. § 1951. *See United States v. Local 560, Int'l Bhd. of Teamsters,* 550 F. Supp. 511 (D.N.J. 1982) (App. A) The subsequent finding of Hobbs Act violation by the defendants were upheld on appeal by the United States Court of Appeals for the Third Circuit. *United States v. Local 560, Int'l Bhd. of Teamsters,* 780 F.2d 267 (3d Cir. 1985) (App. D)

This case involves the first[3] reported decision addressing the question of whether the basic rights of union members guaranteed under the LMRDA constitute extortable property for purposes of the Hobbs Act, which defines the criminal offense of extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). This is a question of considerable importance, because the answer determines what criminal sanctions can be invoked against those who use force or the threat of force to intimidate union members in the exercise of their rights under the LMRDA: the relatively mild sanctions authorized by the

[3]This issue was subsequently considered in *Rodonich v. House Wreckers Union,* Civ. No. 82-5583 (S.D.N.Y. Nov. 7, 1985) (available Feb. 25, 1986, on WESTLAW, QDCT file), also holding that the intangible rights guaranteed by the LMRDA constitute property for purposes of the Hobbs Act.

LMRDA itself, 29 U.S.C. § 530, or the much harsher penalties of the Hobbs Act and RICO as wsell.

Anyone who willfully violates § 530 of the LMRDA can be fined up to $1,000.00, or imprisoned for up to one year, or both. The maximum penalties for violations of the Hobbs Act are much higher – fine up to $10,000.00, imprisonment up to 20 years, or both. 18 U.S.C. § 1951(a). In addition, since violations of the Hobbs Act are predicate offenses for RICO, *see* 18 U.S.C. § 1961(1), the commission of two or more violations of the Hobbs Act can result in criminal and civil liability under the latter statute.

Criminal penalties under RICO include fines of up to $25,000 and sentences of up to 20 years. 18 U.S.C. 1963(a) These are among the harshest penalties in the criminal code. Blakey & Goldstock, *"On the Waterfront:" RICO and Labor Racketeering,* 17 Am.Crim.L.Rev. 341, 349 (1980); *see* Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970,* 83 Yale L.J. 1491, 1493 n.16 (1974). Their severity is enhanced by the fact that most of the circuit courts have held that it is permissible to impose cumulative punishment for both RICO violations and the underlying predicate offenses. *See United States v. Truglio,* 731 F.2d 1123, 1230 (4th Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 197 (1984); *United States v. Sutton,* 700 F.2d 1078, 1081 (6th Cir. 1983); *United States v. Greenleaf,* 692 F.2d 1982, 189 (1st Cir. 1982), *cert. denied sub nom Bratton v. United States,* 460 U.S. 1069 (1983) and *Greenleaf v. United States,* 460 U.S. 1069 (1983); *United States v. Hawkins,* 658 F.2d 279, 287 (5th Cir. 1981); *United States v. Dean, 647 F.2d 779, 785 (8th Cir. 1981), cert. denied,* 456 U.S. 1006 (1982); *United States v. Boylan,* 620 F.2d 359, 361 (2d Cir.), *cert. denied,* 449 U.S. 833 (1980); *United States v. Allman,* 609 F.2d

298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied sub nom Little v. United States*, 445 U.S. 946 (1980). *See also United States v. Black*, 759 F.2d 71, 73-4 (D.C. Cir. 1985) ("government may try a defendant for RICO violations based, in part, on an offense for which he has already been convicted". Finally, the RICO Act also provides for a broad spectrum of civil remedies including private treble damage actions and restraining orders such as those issued in the present case. 18 U.S.C. § 1964(a) & (c). Thus the decision in this case, affirmed by the Court of Appeals, that intimidation of union members in the exercise of their union rights can be prosecuted under the Hobbs Act, makes possible levels of punishment several times higher than the penalties authorized by LMRDA, 29 U.S.C. § 530.[4]

The legislative history of LMRDA makes it very clear, however, that Congress did not intend for such harsh penalties to be available for punishing the misconduct prohibited by § 530. Prior to the enactment of LMRDA, there was considerable disagreement over what should be viewed as criminal conduct and what criminal sanctions should be authorized by the proposed legislation. When the differences were finally resolved, § 530 emerged as a section

[4]The ability to charge an offense under RICO may enable prosecutors to obtain easier verdicts, as well as heavier sentences. According to one writer, the advantages of charging a RICO violation include "the prejudicial effect on judges and juries resulting from the use of the pejorative term 'racketeering' in RICO indictments." Tarlow, *RICO: The New Darling of Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 170 (1980). *See United States v. Anderson, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980), cert. denied*, 450 U.S. 912 (1981) (court reviewed RICO counts, even though convictions on other counts with concurrent sentences were affirmed, "because of the possible stigma stemming from the connotations surrounding the offense of 'racketeering.' ").

creating a misdemeanor rather than a felony. In discussing the report of the Joint Conference Committee, Congressman Udall explained the reasons for this policy decision:

> Criminal penalties for forceable interference with rights guaranteed by the act: This was a major dispute between the supporters of the Elliott and Landrum-Griffin bills during floor debate. It was the contention of the backers of the Elliott bill that the Landrum-Griffin penalties were so stringent that they might deter honest men from seeking and holding union office. We argued that the rights conferred by the act were so numerous and varied that in most instances the penalty did not fit the crime with the result that this sanction would be both harsh and unworkable. Our argument on this point prevailed and the Landrum-Griffin bill was quietly amended so that the drastic felone penalty was reduced to a misdemeanor. This solution was then adopted by the conference report.

105 Cong Rec. 18, 135 (1959).

Also illuminating is Representative Griffin's analysis of two sections of the Landrum-Griffin bill which were eventually adopted as sections 529 and 530 of the LMRDA:

> Section 609 of the substitute provides a civil — not a criminal — remedy, enforcible by the Secretary of Labor, to protect a union member from suffering a fine, suspension, or expulsion because he dares to exercise a right guaranteed under the act. A comparable provision in the Senate — passed bill — section 607 (a), approved by a 90-to-1 vote — would make it a crime for a union official to fine, suspend, or otherwise discipline a union member for exercising his

> rights. *In putting our substitute together, we decided to temper the remedy in this instance because we felt that the conduct proscribed was roughly comparable to activity under the National Labor Relations Act.*
>
> Section 610 of our substitute – comparable to section 607(b) of the Senate bill – would make it a criminal offense for any person – whether he be union official or an employer, or anyone else – to use force or violence, or threats thereof, willfully for the purpose of depriving any union member of a right guaranteed to him by the act.

105 Cong.Rec. 15, 530 (1959) (emphasis supplied). Once again, the concern of the drafters to avoid over-kill in the sanctions which they authorized is plainly apparent from the quoted language.

Given the legislative history of § 530, it is clear that this LMRDA provision was meant for punishing the extortion of union rights through force or threat of force. More general extortion statutes such as the Hobbs Act were simply not intended to apply in cases such as the one at bar. *Cf. Preiser v. Rodriguez,* 411 U.S. 475 (1973) (when prisoners challenge the fact of existence of confinement, their rights are controlled by the federal habeas corpus statute, rather than the more general provisions of 28 U.S.C. § 1983). "[T]he principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . . has special cogency where a court is called upon to determine the extent of punishment to which a criminal defendant is subject for his transgressions." *Simpson v. United States,* 435 U.S. 6, 15 (1978); *see also United States v. Bates,* 429 F.2d 557, 559 (9th Cir. 1970).

The decision in this case permitting LMRDA violations

to be chargeable under the Hobbs Act, if not reversed, will drastically alter the nature of the penalties which can be imposed as punishment for the misconduct prohibited by 2 U.S.C. § 530. Such drastic change will thwart the clear intent of Congress, in drafting the LMRDA, to strike a delicate balance between providing adequate punishment for transgressions and discouraging rank and file union members from seeking union office by the threat of harsh and unworkable sanctions. For these reasons, the Court should grant certiorari in this case.

III.

The third and fourth issues in this case present a common question: can acts which are lawful under LMRDA, standing alone, constitute the factual basis for a finding that the actors aided and abetted in Hobbs Act violations committed by the principals?

As noted earlier, the Court of Appeals held that the Executive Board members had each aided and abetted the commission of two such violations, by virtue of their appointment of Robert Luizzi (a convicted felon) to the office of business agent in 1981, their failure to take immediate steps to remove Nunzio Provenzano from union office upon his conviction of a union-related offense in 1981, and their failure to object to the continuing payments of pension monies to Anthony Provenzano from 1979 to 1982 (the pension to Provenzano having been voted on by the Local 560 membership at a regular membership meeting held in 1976, and payments begun when Provenzano permanently retired from the union in 1978 as a result of his incarceration on a murder charge.

The Board members' appointment of Luizzi was in full compliance with LMRDA 29 U.S.C.A. § 504; Luizzi's only

criminal convictions, for felonious assault and battery and felonious breaking and entering, occurred in 1945 and 1949 repectively. Thus there was clearly no statutory disability barring him from union office in 1981.

The Board members' failure to immediately remove Nunzio Provenzano from office upon his conviction of a crime in 1981 was also in full compliance with § 504; Provenzano had not yet been sentenced, and had not yet pursued his right of appeal, during the brief period of time involved here. (Provenzano's post-conviction bond was conditioned on his resignation from union office, making his post-conviction "retention period" a short one.) But again, during that brief period of time there was clearly no statutory disability barring him from office.

The continuing pension payments to Anthony Provenzano were made pursuant to the union membership's vote awarding him such pension, upon motion made and unanimously passed at a regular memberhsip meeting held in 1976. That Provenzano was incarcerated at the time he was paid his pension is hardly relevant to whether he was entitled to receive these monies. *See Winer v. Edison Brothers Stones Pension Plan,* 593 F.2d 307 (8th Cir. 1979) (legislative history of ERISA, 29 U.S.C. § 1001 *et seq,* shows clearly that Congress intended to severely restrict "bad boy" clauses in pension plans). Thus there was no statutory impediment under LMRDA, 29 U.S.C. § 501(a), to the Executive Board's payment of Provenzano's pension, when the pension had been authorized by the union membership, did not violate the union's constitution, by-laws and resolutions, and did not result in personal gain to the Board members. *McNamara v. Johnston,* 522 F.2d 1157, 1163-64 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976).

But even assuming *arguendo* that there was a § 501(a) failure of fiduciary responsibility on the part of the Executive Board, there is no suggestion by either the District Court or the Court of Appeals as to how this would translate into a Hobbs Act violation. Indeed, one may not be convicted of an LMRDA criminal violation, 29 U.S.C. § 501(c) merely because he has breached his civil fiduciary duties. *U.S. v. Snyder,* 668 F.2d 686, 691 (2nd Cir. 1982).

These combined issues are very fact specific, requiring a close reading of the opinions of the Courts below (App. B and D), but are also significant federal issues which have not been decided by this Court and are likely to recur in the highly charged arena of RICO litigation involving labor unions. The case at bar presents an excellent opportunity to resolve the issues of whether the acts of union officers which are lawful under LMRDA, §§ 501(a) and § 504, can constitute acts of aiding and abetting an extortion of LMRDA rights under § 411, chargeable under RICO.

CONCLUSION

For all of the reasons set forth herein, this Court should

CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, and should resolve these issues which are of fundamental importance to the federal judicial system.

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PROOF OF SERVICE

I, Barbara H. Fleisher, counsel of record for the petitioners herein, do hereby certify and acknowledge that three (3) copies of the within "Petition for Writ of Certiorari" were served upon the following individuals, at the addresses indicated, by first-class mail, postage prepaid, this 28th day of February, 1986:

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85-1448

Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES SUPREME COURT

Term

LOCAL 560 of the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen,
and Helpers of America,
MICHAEL SCIARRA, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO, Sec-Treasurer,
STANLEY JARONKO, Trustee,
and
JOSEPH SHERIDAN,
JOSEPHINE PROVENZANO,
MICHAEL SCIARRA,
STANLEY JARONKO,
Petitioners (Appellants Below),

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below).

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

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APPENDIX A

UNITED STATES of America, Plaintiff,

v.

LOCAL 560, etc. et al., Defendants.

Civ. No. 82-689.

United States District Court,
D. New Jersey.

Nov. 1, 1982.

Government brought civil action under Racketeer Influence and Corrupt Organizations Act against labor union. On motion to dismiss, the District Court, Harold A. Ackerman, J., held that: (1) rights guaranteed to union members under the union members Bill of Rights are intangible rights within the ambit of the Hobbs Act; (2) Hobbs Act was not impliedly repealed by portion of the Labor Management and Disclosure Act; and (3) conduct which violates the LMRDA may also violate RICO.

Motion denied.

1. Extortion and Threats 4

Evidence is sufficient in a Hobbs Act action if the proof shows that the victim suffered a loss, although not necessarily that extortioner received the fruits of the extortion, that the extortioner instilled a fear of economic loss in the victim, and that there was some minimal effect on commerce. 18 U.S.C.A. § 1951(b)(2).

2. Labor Relations 311

Rights created by the Union Members Bill of Rights are not within the primary jurisdiction of the NLRB. Labor-Management Reporting and Disclosure Act of 1950, § 101, 29 U.S.C.A. § 411.

3. Extortion and Threats 2

Provision of the Labor-Management Reporting and Disclosure Act making it unlawful to intimidate or coerce any member of a labor organization through force or the threat of violence did not repeal the Hobbs Act insofar as rights guaranteed by the Union Members Bill of Rights is implicated. Labor-Management Reporting and Disclosure Act of 1959, §§ 101, 610, 29 U.S.C.A. §§ 411, 530; 18 U.S.C.A. § 1951.

4. Labor Relations 732

Conduct proscribed by statute prohibiting coercion or intimidation of a union member through violence or the threat of violence is essentially assault and battery. Labor-Management Reporting and Disclosure Act of 1959, § 610, 29 U.S.C.A. § 530.

5. Extortion and Threats 4

Rights guaranteed under the Union Members Bill of Rights are intangible rights within the ambit of the Hobbs Act. Labor-Management Reporting and Disclosure Act of 1959, § 101, 29 U.S.C.A., § 411; 18 U.S.C.A. § 1951.

6. Commerce 82.5

Conduct which is regulated or proscribed under the Labor-Management Reporting and Disclosure Act may also violate RICO. Labor-Management Reporting and Disclosure Act of 1959, § 101 et seq., 29 U.S.C.A. § 411 et seq.; 18 U.S.C.A. §§ 1961-1968.

U.S. Dept. of Justice by Thomas Weisenbeck, Sp. Atty., Newark, N.J., for plaintiff.

Schneider, Cohen, Solomon & DiMarzio by Edward Cohen, Paul Montalbano, Jersey City, N.J., for defendant, Local 560.

Brenner, New & Brenner by Herbert New, Livingston, N.J., for defendant, Trucking Employees of New Jersey Welfare Fund.

OPINION

HAROLD A. ACKERMAN, District Judge.

This civil action brought pursuant to the Racketeer Influence and Corrupt Organizations Act (RICO)[1] presents a question of first impression. The United States charges that Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Local 560), together with its Welfare and Pension Funds (Funds) and its Severance Pay Plan, (Plan), is a "captive labor organization." [2] It principally seeks an order placing Local 560 under a trusteeship, divesting the individual defendants of their interests in the union, and prohibiting their future involvement in the union's affairs. Local 560, the Funds and the Plan are named in the complaint as nominal defendants and referred to collectively as the "Local 560 Enterprise." Also named as defendants are the current members of the Executive Board of Local 560: Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano Septembre, J. W. Dildine, Thomas Reynolds, Sr.; Michael Sciarra and Stanley Jaronko; the trustees and administrators of the Plan: Salvatore Provenzano and Josephine Provenzano Septembre; the employee trustees of the Funds: Salvatore Provenzano and Thomas Reynolds, Sr.; and the following individuals: Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta and Gabriel Briguglio. The government with this court's consent has entered into stipulations of settlement with Anthony Provenzano[3] and

---

1. Chapter 96 of Title 18, 18 U.S.C. §§ 1961-1968, was added to that title by Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941.

2. The Fund and Plan have been merged and split several times, the two most recent events being the March 1, 1974 separation of Locals 617 and 641 from the Trucking Employees of North Jersey Welfare Fund (and Pension Plan) and the May, 4, 1977 merger of the North Jersey Fund and Plan with that of the Trucking Employees of Passiac and Bergen Counties.

3. A consent order was entered by this court on June 15, 1982 approving of the terms agreed upon by the United States and defendant Anthony Provenzano. That order stated, *inter alia*—

> The defendant be and is hereby permanently enjoined and prohibited from any form of association with any enterprise (within the meaning of Section 1961 of Title 18 of the United States Code), which enterprise

Nunzio Provenzano. [4]

The complaint alleges that the Local 560 Enterprise is an "enterprise" within the meaning of 18 U.S.C. § 1961(4).[5] It further charges that the named individuals are associated under the leadership of defendant Anthony Provenzano, (Provenzano Group), which group allegedly unlawfully conspired, in violation of 18 U.S.C. § 1962(d), to violate and actually did violate 18 U.S.C. § 1962(b) and (c).

The case is presently before me[6] on the motion of Local 560 pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss paragraph 12(a) of the complaint for failure to set forth a cause of action. A complaint may only be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) if, accepting the factual allegations of the complaint as true, it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Jamieson v. Robinson*, 641 F.2d 138 (3d Cir. 1981). For the reasons which follow, I am denying the defendant's motion to dismiss.

In order to understand the thrust of the defendant's motion, it is necessary to outline the structure of this complaint in some detail prior to summarizing the arguments raised in the moving papers.

The government alleges in paragraph 12(a) that defendant Anthony Provenzano and other defendants either associated with the Provenzano Group or aiding and abetting the same, violated section 1962(b) of RICO.[7] Section 1962(b) provides in pertinent part:

NOTES (*Continued*)

seeks, directly or indirectly, to dominate, control, conduct or otherwise influence the affairs of any labor organization or any employee benefit plan (within the meaning of Title 29 of the United States Code).

4. A similar consent order was entered on September 15, 1982 approving of the terms agreed upon by the United States and Nunzio Provenzano.

5. 18 U.S.C. § 1961(4) provides:

"enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

6. Subparagraphs 12(a)(26), (27) and (28) were added to the complaint upon application by the plaintiff for leave to file an amended complaint pursuant to Fed.R.Civ.P. 15(a) granted on September 20, 1982.

7. The complaint also alleges in paragraph 12(b) that the defendants violated 18 U.S.C. § 1962(c) of RICO. That portion is not at issue in this motion.

> It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.

"Pattern of racketeering activity" is defined as at least two acts of racketeering activity, within a period of ten years (excluding any period of imprisonment), one of which has to have occurred after the effective date of the Act. 18 U.S.C. § 1961(5). RICO defines "racketeering activity" by reference to certain crime chargeable under state law and to certain indictable offenses under federal law. 18 U.S.C. § 1961(1).[8]

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8. 18 U.S.C. § 1961(1) provides:

"Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery) sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to mail fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

Paragraph 12(a) charges the "predicate" [9] offenses of murder and Hobbs Act extortion, 18 U.S.C. § 1951, as the pattern through which the defendants unlawfully acquired and maintained a controlling interest in the Local 560 Enterprise. Specifically, the property which is alleged to have been systematically extorted was "in the form of [the members] union rights as guaranteed by the provisions of sections 157[10] and 411 of Title 29."

The union rights guaranteed by section 411 were enacted as Title I of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 411 *et seq.*, and referred to as the "Bill of Rights Members of Labor Organizations." [11] Its emphasis is

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9. The statute which satisfies the "racketeering activity" element is commonly called the predicate offense.

10. 29 U.S.C. § 157 is section 7 of the Taft-Hartley Act. Defendant notes in its brief that the plaintiff appears to have foregone reliance upon it. In *United States v. Boffa*, 686 F.2d 919 (3d Cir. 1982), as discussed *infra*, the reliance on that provision as the source of intangible rights under the mail fraud statute was overturned.

11. 29 U.S.C. § 411 provides:

(a)(1) Equal rights—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly—Every member of any labor organization shall have the right to meet and assemble freely with other members, and to express any views, arguments, or opinions, and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business property before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings. *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by

on the rights of union members to freedom of expression without fear of sanctions by the union, which in many in-

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secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

> stances could mean loss of union membership and in turn loss of livelihood.

Finnegan v. Leu. ____ U.S. ____, ____, 102 S.Ct. 1867, 1870, 72 L.Ed.2d 238 (1982). The provision which ultimately was enacted as Title I was introduced as a floor amendment by Senator McClellan to the Kennedy Ervin bill, S.1555. 105 Cong.Rec. 5810 (daily ed., Apr. 22, 1969) II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter Legis.Hist.) 1102. Senator McClellan believed that

> . . . we ought to start with the union man, with the worker, and to relieve him from the oppression which has been thrust upon him in some places. We should restore to him his rights. We should vest in him again the power to do something to protect his rights. We must give him the authority again to run his own union. We must pass a law, such as the measure now proposed, which will enable him to prevent usurpation by would-be exploiters. Let us start to help the worker.

105 Cong. Rec. 5818 (daily ed. Apr. 22, 1959), II Legis.Hist. 11056. The amendment passed by a slim margin of 47 to 46. 105 Cong.Rec. 5827 (daily ed. Apr. 22, 1959) II Legis.Hist. 1118. *See generally United Steelworkers of America v. Sadlowski*, ____ U.S. ____, ____, 102 S.Ct. 2339, 2342, 72 L.Ed.2d 707 (1982).

The particular acts of the defendants which allegedly created the climate of intimidation which in turn induced the surrender of the members' rights are included as subparagraphs (1) through (28) of paragraph 12(a). The specific acts alleged, are: (1) the June 1961 murder of Anthony Castellitto; (2) the August 1961 appointment of Salvatore Provenzano to the position of Trustee formerly occupied by Castellitto; (3) the September 1961 appointment of Salvatore Briguglio—the alleged murderer of Castellitto—to the position of Business Agent; (4) the February 1963 appointment of Nunzio Provenzano to the position of Business Agent following his January 1963 conviction for extortion; (5) the May 1963 murder of Walter Glockner; (6) the 1964 appointment of Robert A. Luizzi to the position of Business Agent

in spite of a record of criminal convictions; (7) the May 1967 appointment of Luizzi to the position of Trustee; (8) the February 1969 appointment of Salvatore Briguglio to position of Business Agent following completion of a term of imprisonment for extortion; (9) the April 1969 appointment of Nunzio Provenzano to the position of clerk following completion of a term of imprisonment for extortion; (10) the 1970 appointment of Nunzio Provenzano to the position of Business Agent; (11) the 1971 appointment of Thomas Reynolds, Sr. to the position of Business Agent in spite of a record of criminal activity; (12) the 1972 appointment of Nunzio Provenzano to the position of Fund Trustee; (13) the 1972 appointment of Salvatore Briguglio to the position of Fund Trustee; (14) the allowance of frequent visitations by Armand Faugno and Thomas Andrette to the offices of Local 560; (15) the January 1963 appointment of Nunzio Provenzano to the position of Secretary-Treasurer; (16) the 1973 appointment of Reynolds to the position of Fund Trustee; (17) the 1974 resumption of duties as Business Agent by Salvatore Briguglio following completion of a term of imprisonment for counterfeiting; (18) the 1974 appointment of Luizzi to the position of Fund Trustee; (19) the November 1975 appointments of Anthony and Nunzio Provenzano to the positions of Secretary-Treasurer and President, respectively, in spite of a record of convictions for extortion; (20) the February 1977 appointment of Reynolds to the position of Trustee; (21) the July 1978 appointment of Josephine Provenzano Septembre to the position of Secretary-Treasurer following Anthony Provenzano's conviction for the Castellitto murder; (22) the July 1981 appointment of Salvatore Provenzano to the position of President following Nunzio Provenzano's forced resignation as a condition of bail on a labor racketeering conviction; (23) the Executive Board's failure to recover monies wrongfully converted by Anthony Provenzano; (24) the retention of Marvin Zalak as Fund Administrator in spite of payments accepted by him from an insurance company representative during the 1960's; (25) the retention of Ralph Torraco as the Fund's independent certified public accountant in spite of his federal indictment for systematically overbilling the Fund; (26) the extortion of contributions to the

defense funds of the Provenzanos and Michael Sciarra from union members; (27) the 1981 appointment of Luizzi to the position of Business Agent; and (28) associations by some of the defendants with Frank "Funzi" Tieri and Matteo Alfredo Iannielo, reputed organized crime members.

Defendant Local 560 in moving to dismiss paragraph 12(a) contends that the rights guaranteed by section 411 are not "property" extortable under the Hobbs Act. The argument is premised on two propositions, the correctness of either of which will entitle the defendant to the dismissal of this portion of the complaint; first, that the concept of "property" under the Hobbs Act does not embrace the rights created under section 101 of the LMRDA; and second, to the extent that these rights are extortable, that the LMRDA provides the exclusive criminal sanction for such a violation. *See* 29 U.S.C. §530.[12]

The government argues that section 610 of the LMRDA is not the exclusive remedy for extortionate taking of section 411 rights. The LMRDA, it contends, neither expressly nor impliedly repealed the Hobbs Act's application to conduct which might also violate sections of the LMRDA because Congress did not intend the LMRDA to be exclusive. The government further submits that section 530 does not prohibit the conduct alleged in the complaint because it is essentially an assualt and battery statute.

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12. 29 U.S.C. §530 entitled "Deprivation of Rights by violence, penalty" provides:

> It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

29 U.S.C. §529 makes it unlawful for any labor organization, officer or employee to "fine, suspend, expel, or otherwise discipline" a member for exercising any rights granted under the LMRDA. The remedy provided is a civil one.

A review of some of the history preceding the enactment of the Hobbs Act and the LMRDA will be helpful for an understanding of the issues raised in this motion. The precursor to the Hobbs Act was the Anti-Racketeering Act of 1934. It was designed to penalize extortion and racketeering and to protect commerce against interference by threats and violence. Annot., 4 A.L.R.Fed. 881, 890 (1970). In 1942, the Supreme Court narrowly construed the provisions of the Anti-Racketeering Act to exclude from its extortion coverage certain labor activities. Congress thereafter enacted the Hobbs Act in reaction to that decision in order to implement its intentions to curb labor racketeering. While aimed at labor racketeering, its broad terms cover a field comparable to existing state extortion statutes. *See generally United States v. Harding*, 563 F.2d 299, 302-04 (6th Cir. 1977) *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

The LMRDA, in addition to the Bill of Rights of Title I discussed earlier, contained five titles designed primarily to achieve internal union democracy with one additional title covering amendments to the Taft-Hartley Act. It included comprehensive reporting requirements, 29 U.S.C. §§431-41; regulation of the imposition of trusteeships over subordinate labor organizations, 29 U.S.C. §§461-66; the establishment of election procedures, 29 U.S.C. §§481-82; safeguards in the form of fiduciary standards amd responsibilities for officers, 29 U.S.C. §§501-04; and numerous civil, administrative, and criminal enforcement provisions. The congressional debate centered primarily upon the Taft-Hartley Amendments. For a discussion of the controversy surrounding its passage, see A.B.A. *The Developing Labor Law*, 49-59 (1971).

In analyzing the interplay between the Hobbs Act and the LMRDA, I take guidance from the recent opinion of the Third Circuit Court of Appeals in *United States v. Boffa*, 688 F.2d 919 (1982). In *Boffa*, this Circuit found, on the one hand, that the RICO predicate act of mail fraud, 18 U.S.C. §1341, may encompass a scheme to deprive union members of the right to the honest and faithful services of union officials provided in section 501 of the LMRDA, 29 U.S.C. §501, but may not, on the other hand,

encompass a scheme to deprive employees of rights created by section 7 of the National Labor Relations Act (NLRA) 29 U.S.C. §157. The dichotomy of treatment given these statutes is instructive.

In *Boffa* the defendants Eugene Boffa, Sr., Robert Boffa, Sr., and Chandler Lemon who operated labor leasing businesses switched labor leasing contracts they had with certain facilities from corporations they controlled to others ostensibly independent but which they also controlled for the purpose of lowering wages paid and/or increasing fees charged. The defendants assured themselves of the cooperation of defendant Francis Sheeran who was the president of the local Teamsters union which represented some of the leased drivers by delivering money or some other thing of value to him violation of the Taft-Hartley Act, 29 U.S.C. §186(a)(4). The mailing of the notices of termination to the employee drivers in furtherance of the scheme formed the basis of the mail fraud indictments. At 924-925.

In examining the contentions of the appellants that the labor switches were, at most, unfair labor practices, the Third Circuit first reviewed the statutory coverage of the mail fraud statute to find that in general "a scheme to deprive persons of intangible rights or interests may be within the ambit of 18 U.S.C. §1341." *Id.* at 927. However, in order to discern whether any federal statute in particular can serve as the source of an intangible right in a mail fraud prosecution, the court examined the language and legislative history of the federal statute. Chief Judge Seitz stated:

> As a matter of statutory construction we are unwilling to sanction mail fraud prosecutions for schemes to deprive individuals of a particular intangible right when such a prosecution would contravene the intent of the Congress that created that right.

Id. at 926. The court therefore inquired into the congressional policies underlying the NLRA and the LMRDA, the two sources of the rights allegedly defrauded by the defendants.

Two policies underlying the NLRA were found particularly pertinent in *Boffa:* "the remedial nature of the Act and the primacy of the National Labor Relations Board in resolving unfair labor practice disputes." *Id.* at 927. The legislative history evinced Congress's intent that "violations of the civil provisions of the Act were to be without criminal consequences." *Id.* at 928. The Third Circuit, relying upon *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11, 61 S.Ct. 77, 79, 85, L.Ed. 6 (1940), emphasized that the Act's remedial measures " 'relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury . . . .' " *Id.*

The exclusive authority of the Board to decide what constitutes an unfair labor practice was also considered in *Boffa* to be pertinent in ascertaining the scope of the mail fraud statute. The court stated:

> We believe the 'overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress', *New York Telephone Co. v. New York Labor Department*, 440 U.S. 519, 528 [99 S.Ct. 1829, 1834, 59 L.Ed.2d 553] (1979), casts serious doubt on the proposition that Congress intended schemes to defraud employees of section 7 rights to fall within the ambit of the mail fraud statute.

688 F.2d at 929. It held on the basis of these two congressional policies that such a scheme does not constitute mail fraud.

The RICO indictment in *Boffa*, as I indicated earlier, also alleged that the defendants Boffa and Lemon had violated the mail fraud statute through a scheme to deprive employees of the loyal, faithful, and honest services of their union president, defendant Sheeran. The Third Circuit's analysis of whether the mail fraud statute could encompass these rights paralleled that of the NLRA rights and is especially instructive of the issue before me.

Section 501(a) of the LMRDA was found to impose fiduciary responsibilities upon union officials and to establish a corresponding right in the members to the honest and faithful services of union officials. *Id.* at 930-991. The court defined this as an

"intangible right" and examined the legislative history for indications as to whether prosecution for schemes to defraud employees of their rights under section 501 would contravene any congressional policy. It found no such indications pointing to the fact that the remedy under section 501 merely permits a union member to bring an action against officials who breach their fiduciary duty but not against employers or third parties. It went on to hold:

> This remedy was clearly not intended to be exclusive. See 29 U.S.C. §413 (nothing in this title 'shall limit the rights and remedies of any member of a labor organization under State or Federal law or before any other court or tribunal'); Cox, *Labor Law Preemption Revisted*, 85 Harv.L.Rev. 1937, 1371 (1972) ('Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for union-member relations."). . . . In short, there is no indication that prosecutions for schemes to defraud employers of the intangible right provided in 29 U.S.C. §501 would contravene any congressional policy. See *United States v. Stout*, 499 F.Supp. 602 (E.D. Pa. 1980) (LMRDA does not preclude mail fraud prosecution for union official's scheme to defraud his labor union.).

Id. at 931. Therefore, the court concluded that section 501 rights are within the scope of the mail fraud statute. *Id.* at 931.[13]

The issue raised by Local 560's motion to dismiss is whether section 411 rights are within the ambit of the Hobbs Act. With *Boffa* as a guide, I turn now to this issue. The Hobbs Act, 18 U.S.C. §1951[14] forbids interference with commerce by extor-

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13. The court also considered and rejected defendants' argument that "by enacting the NLRA, Congress intended to work an implied repeal of existing federal criminal statutes insofar as they regulate 'arguably prohibited' conduct." *Boffa*, supra, 688 F.2d at 932.

14. 18 U.S.C.A. §1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion of attempts or conspires so to do, or commits or

tion. The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear" . . . 18 U.S.C. §1951(b)(2). The essential elements of a Hobbs Act violation, therefore, are—

> (1) that the defendants induce their victims to part with property, (2) that they do so through the use of fear, and (3) that, in so doing, they adversely affect interstate commerce.

United States v. Addonizio, 451 F.2d 49, 59 (3d Cir.) cert. denied, 405 U.S. 1048, 92 S.Ct. 1909, 31 L.Ed.2d 591 (1972).

[1] The Hobbs Act has been construed broadly so as to implement Congress's purpose "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1959). For example, with respect to each of the aforementioned elements, it is sufficient if the proofs show (1) that the victim suffered a loss but not necessarily that the extortioner received the fruits of the extortion, *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir.) *cert. denied*, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964); (2) that the extortioner instilled in the victim a fear of economic loss, *Addonizio*, *supra*, 451 F.2d at 72; *United States v. Sweeney*, 262 F.2d 272 (3d Cir.1959); and (3) that there was some minimal effect on commerce. *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979) *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980).

Courts have upheld Hobbs Act extortion prosecutions based on the loss not only of tangible property but also of intangible "property" rights. *See United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) *cert. denied*, 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 459 (1979) (right to make business decision free from outside pressure); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.) *cert. denied*, 411 U.S. 951, 93 S.Ct. 1924, 36 L.Ed.2d 414 (1928) (right to solicit business accounts and hire business

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threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

representatives); *United States v. Tropiano*, 418 F.2d 1069, 1073-76 (2nd Cir. 1969) *cert. denied*, 397 U.S. 1021, 90 S.Ct. 1258, 25 L.Ed.2d 530 (1970) (right to solicit business accounts); *Bianchi v. United States*, 219 F.2d 182, 189 (8th Cir.) *cert. denied*, 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249 (1955) (rights under construction contract); *United States v. Stofsky*, 409 F.Supp. 609, 615 (S.D.N.Y.1978) (right to solicit business). The complaint at issue, as stated earlier, alleges that the property extorted was the members' rights conferred by 29 U.S.C. §411. In this instance, the LMRDA is the source of such intangible rights. I must therefore determine whether in enacting the LMRDA Congress intended this intangible right to be outside the ambit of the Hobbs Act. *Boffa*, *supra*, 688 F.2d at 926-927.

[2] Section 411, as stated earlier, was enacted by Congress as the central provision of Title I of the LMRDA, creating a "Bill of Rights of Members of Labor Organizations." Title I also gives to union members a direct cause of action against the union and its officers for infringement of these rights. 29 U.S.C. §412. Any pre-existing state or federal remedies are explicitly preserved by this Title. 29 U.S.C. §413. *See Maier v. Patterson*, 511 F.Supp. 436 (E.D.Pa.1981). These rights therefore are not within the primary jurisdiction of the National Labor Relations Board. *See Fulton Lodge No. 2 of Internat'l Ass'n of Machinists and Aerospace Workers v. Nix*, 415 F.2d 212 (5th Cir.1969). Under the teaching of *Boffa*, these characteristics are clearly indicative of a nonexclusive statutory scheme. Furthermore, the LMRDA contains a second and broader saving provision applicable to the entire act:

> Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, *nothing in this chapter shall take away any right or bar any remedy to*

which members of a labor organization are entitled under such other Federal law or law of any State. (Emphasis added)

29 U.S.C. §523(a).

The LMRDA is not an " 'impliedly exclusive plan of federal regulation for union-member relations.' " *Boffa, supra*, 688 F.2d at 931 (quoting Cox, *Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337, 1372 (1972)). The congressional declaration of findings, purposes and policy which prefaces the LMRDA clearly establishes the role this legislation is to play in the larger scheme of labor law:

> The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct *which require further and supplementary legislation* that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations, consultants, and their officers and representatives. (Emphasis added)

29 U.S.C. §401(b).[13] Therefore, there is no indication that pros-

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13. Senator Goldwater also reflected on the supplementary nature of the LMRDA and its interaction with the Hobbs Act:

> Criminal procedures are surrounded with safeguards for the accused, and are inevitably, slow, cumbersome, uncertain. We do not wish to destroy these safeguards, they are a necessary part of our traditional system of civil liberties and protection against judicial and governmental tyranny. But we cannot escape the fact that the requirement of an indictment by a grand jury, the availability of the fifth amendment, the need for proof beyond a reasonable doubt, the right to a jury trial, the rigid rules of evidence, all of which prevail in a criminal prosecution, render this type of sanction an awkward and often ineffectual weapon against misconduct in the labor-management field.
>
> There are now on the Federal statutes books three laws in the field of labor which utilize the methods of the criminal prosecution.
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> * * * * * * * * *

ecutions for conduct which extorts from members the intangible right provided in 29 U.S.C. §411 would contravene any congressional policy.

[3] The defendant also asserts a distinct but related ground for dismissal of paragraph 12(a). It argues that the conduct alleged in the complaint is embraced by a specific criminal provision of the LMRDA, 29 U.S.C. §530, which precludes application of the Hobbs Act. Plaintiff responds that the two statutes do not cover the same ground. It further argues that even if they did, section 530 cannot be read to repeal the Hobbs Act insofar as extortion of section 411 rights is implicated. I find that section 530 is not an extortion statute and that the principle of statutory construction of implied repealer is inapplicable.

Section 530 provides:

> It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter.

NOTES (*Continued*)

The third instance is the Hobbs Act, which

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> is designed to reach many of the practices engaged in by the Teamsters as disclosed by the McClellan hearings, yet, as those hearings conclusively demonstrate, these vicious practices go merrily on despite the Hobbs Act.
>
> Thus, it is evident beyond any reasonable doubt that criminal proceedings are not the proper machinery for cleaning up the abuses in the labor-management field. And incidentally, we should recognize the wisdom of the Congress in deliberately avoiding the criminal law approach in favor of administrative sanctions when it enacted the Wagner and Taft-Hartley Acts to cope with the evils at which those statutes were aimed. However, we do not wish to eliminate these criminal sanctions but rather to supplement them, thus providing a well-rounded and effective enforcement machinery which would give genuine vitality to those few rights which the committee bill confers.

105 Cong.Rec. 9110 (daily ed. June 8, 1959) II Legis.Hist. 1282.

The penalty is a fine of $1,000 and/or imprisonment for a term of not more than one year.

The provision as enacted represented a compromise between the House and Senate versions of the Act. The Senate, as noted earlier, passed the Kennedy-Ervin bill, S. 1555, of which section 506(b) made it unlawful for any person to restrain, coerce or intimidate any member "through the use of force or violence, or threat of the use of force or violence, *or by economic reprisal or threat thereof*." (Emphasis added). A violation of this provision was made a felony with a maximum penalty of $10,000 or imprisonment for not more than 2 years or both. A bill introduced in the House by Rep. Landrum and Rep. Griffin, H.R. 8400, as a substitute for the House bill reported out of committee, H.R. 8342, provided for the same penalty as the Senate bill but did not include the language on economic reprisal emphasized above. The Landrum-Griffin bill was substituted on the floor of the House only after it was amended, *inter alia*, to reduce these criminal penalties to a maximum imprisonment of one year and a fine of $1,000.[16] In the conference committee, the House version was adopted on this point.

The reason for the deletion of the phrase "economic reprisal" by the House, and some clue as to its significance, is found in the remarks and analysis of Rep. Griffin:

> Section 610 (denial of rights through violence): Like the previous section, this section deals with the denial of rights guaranteed to union members. However, unlike section 609, this section applied to the denial of such rights through force or violence. Criminal penalties in this case are justified and, accordingly, are provided. Section 610 is comparable to section 607(b) of S. 1555, which was stricken by the House committee. However, the words "or by economic reprisal or threat thereof" in the Senate-passed bill are omitted in the substitute. We believe the quoted language too vague for

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16. 105 Cong. Rec. 14313 (daily ed. Aug. 13, 1959) II Legis. Hist. 1685.

> criminal enforcement and, further, that the activity proscribed is covered, and should be prohibited, under the phrase "or otherwise discipline" in section 609 where civil remedies are available for enforcement.

105 Cong.Rec. 13091 (daily ed. July 27, 1959), II Legis.Hist. 1522 (1959). The sanction as passed by the Senate and originally included in the Landrum-Griffin bill was considered too harsh:

> This was a major dispute between the supporters of the Elliott and Landrum-Griffin bills during floor debate. It was the contention of the backers of the Elliott bill that the Landrum-Griffin penalties were so stringent that they might deter honest men from seeking and holding union office. We argued that the rights conferred by the act were so numerous and varied that in most instances the penalty did not fit the crime with the result that this sanction would be both harsh and unworkable. Our argument on this point prevailed and the Landrum-Griffin bill was quietly amended so that the drastic felony penalty was reduced to a misdemeanor. This solution was then adopted by the conference report.

105 Cong.Rec. 16637 (daily ed. Sept. 4, 1959) (remarks of Rep. Udall), II Legis.Hist. 1722. Defendant contends that section 530 was thus enacted as a misdemeanor extortion provision specially tailored to the purposes of the LMRDA. I disagree.

[4] As the preceding review of the legislative history indicates and the cases construing section 530 confirm, the conduct proscribed by this provision of the LMRDA is essentially assault and battery. *See United States v. Williams*, 624 F.2d 75 (9th Cir. 1980) (defendant hired someone to assault member in retaliation for outspoken opposition); *United States v. Kelley*, 545 F.2d 619 (8th Cir. 1976) *cert. denied*, 430 U.S. 983, 97 S.Ct. 1333, 51 L.Ed.2d 777 (1977) (defendant threw a bat and fired three shots at truck containing dissatisfied members who were circulating a petition); *United States v. Bertucci*, 333 F.2d 292 (3d Cir.) *cert. denied*, 379 U.S. 839, 85 S.Ct. 75, 13 L.Ed.2d 45 (1964) (brawl found to have arisen out of conspiracy to prevent members from

exercising right to attend and participate in meeting); *United States v. Roganovich*, 318 F.2d 167 (7th Cir. 1963) (disturbance at a local union meeting over criticism of report of business agent); *Maier, supra*, 511 F.Supp. 436 (E.D.Pa. 1981) (genuine issue of material fact as to whether assault was for purpose of chilling section 411 rights). In accord is the view of Senator Morse who, in opposing the passage of section 530, commented—

> [T]he conference committee bill would make it a Federal crime to use force or the threat of force to prevent a member, by intimidation, from exercising rights to which he is entitled under the bill. A similar provision was included in section 607(b) of the Kennedy-Ervin bill, as passed by the Senate. The Kennedy-Ervin bill, however, prohibited economic reprisal, as well as the use of force or the threat of force, and imposed substantially heavier penalties for violations than does the conference committee bill. Generally speaking, the effect of these provisions is to make *assault and battery* a Federal crime, but only when it occurs in a union. I have already referred above to the inappropriateness of provisions of this type for the enforcement of the rights of union members. (Emphasis added)

105 Cong.Rec. 16389 (daily ed. Sept. 3, 1959), II Legis.Hist. 1418.[17] For these reasons, I do not find, as defendant contends,

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17. This is further confirmed by a review of the hearings recently held on the proposed Labor Management Racketeering Act of 1981, S. 1785. Sen. Bill 1786 proposes to toughen certain provisions of the Taft-Hartley Act, the LMRDA and ERISA. S.Rep. No. 97-497 introduced the bill thus—

> The purpose of this bill is to afford greater protection for unions and employee benefit plans from corrupt union and management officials by increasing the penalties for violating portions of three statutes—the Labor Management Relations Act of 1947, known as the Taft-Hartley Act, the Employee Retirement Income Security Act of 1974, known as "ERISA", and the Labor-Management Reporting and Disclosure Act of 1969, known as the Landrum-Griffin Act. The bill is a direct outgrowth of public hearings held before the Permanent Subcommittee on Investigations.

One of the provisions of the bill would expand the list of generic crimes which qualify a person from serving in a fiduciary capacity under the LMRDA, 29

that section 530 is an extortion statute.

When compared to the prohibition within the LMRDA against extortionate picketing, 29 U.S.C. §522,[18] it becomes even clearer that Congress carefully chose the words it did and the penalty to be imposed in section 530 in order to penalize labor extortion in the one instance but not in the other. Senator John F. Kennedy commented on the relationship between the Hobbs Act and extortionate picketing provision which became section 522:

> Under the provisions of the Kennedy-Ervin bill last year we provided that anyone who engaged in picketing for

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NOTES (*Continued*)

U.S.C. §504, to parallel the list contained in a similar provision under the Employment Retirement Income Security Act, 29 U.S.C. §1111. In its examination of the effect of the bill's amendments, the Office of Legislative Affairs of the United States Department of Justice was of the view that:

> The list of specific crimes in Section 111 would also provide new protection under Section 504 with respect to persons convicted of the following statutory crimes:
>
> * * * * * * *
>
> 3) those deprivations of union members' rights through the threatened use of violence in violation of 29 U.S.C. 530 which could not otherwise be characterized as *murder, assault with intent to kill, or assault which inflicts grievous bodily injury;* (Emphasis added)
>
> * * * * * * *

Hearing before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources on S. 1785, 97th Cong., 2d Sess. 73 (1962). As section 504, in addition to murder, etc., disqualifies persons who have been convicted of extortion, the Justice Department's enumeration supports my construction of section 530 as an assault and battery statute.

18. 29 U.S.C. §522 entitled "Extortionate picketing; penalty for violation" provides:

> (a) it shal be unlawful to carry on pickering on or about the premises of any employer for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (*except* a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent.
>
> (b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

the purpose of a shakedown should be guilty of an unfair labor practice. That was an additional remedy, to be available in addition to the Hobbs Act.

There has always been some question as to whether the Hobbs Act applied to cases in which violence did not take place. In addition, this provision provided a quicker remedy. It provided for compulsory immediate injunction, while the criminal prosecution might be going on.

There was some objection to making this practice an unfair labor practice, and a felony rather than a misdemeanor. The Department of Justice raised the question 3 or 4 days ago as to whether this provision might not raise some question as to the sanctions available under the Hobbs Act. Therefore, in order to make sure that there is no choice of sanctions, as between those which might be misdemeanors and those which might be felonies, the amendment is now rewritten, so that the sanctions against using a picket line for the purposes of extorting money are now identical with those under the Hobbs Act.

This provision would not weaken or change the Hobbs Act. It would merely provide that when there is any question as to whether the Hobbs Act applies in cases in which violence does not occur, as in the case of shakedown picketing, adequate sanctions are provided. This language is in accordance with the views of the Department of Justice

106 Cong. Rec. 5861 (daily ed. Apr. 23, 1969), II Legis. Hist 1135. In enacting section 522, therefore, Congress was ensuring one, that extortion would be construed to include nonviolent conduct and two, that that section would operate in tandem with the Hobbs Act. This leads to the other point raised by the parties, whether both the Hobbs Act and section 530 can apply to conduct which infringes upon section 411 rights.

While the defendant refrains from resting upon the disfavored principle of implied repealer, *Posadas v. National City Bank*, 296 U.S. 497, 504-05, 56 S.Ct. 349, 352-353, 80 L.Ed. 351 (1986), to say that section 530 preempts or controls the field is to

say the same thing.' "To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute . . . is, in effect, to accomplish a partial repealer of the general statute.' " *Boffa, supra*, 688 F.2d at 932 (quoting *United States v. Burnett*, 505 F.2d 813, 916 (9th Cir. 1974) (per curiam), *cert. denied, sub nom. Lyon v. United States*, 420 U.S. 966, 95 S.Ct. 1361, 48 L.Ed.2d 445 (1975)). *See also Stout, supra*, 499 F.Supp. at 608. The touchstone for application of implied repealer is the "positive repugnancy" between the provisions. *United States v. Batchelder*, 442 U.S. 114, 122, 99 S.Ct. 2198, 2203, 60 L.Ed.2d 755 (1979). In *Batchelder*, the Supreme Court stated that "it is 'not enough to show that the two statutes produce differing results when applied to the same factual situation.' *Radzanower v. Touche Ross & Co.*, 425 U.S. 148, 155 [96 S.Ct. 1989, 1993-1994, 48 L.Ed.2d 540] (1976)." *Id.* The Court reversed the lower court's ruling that two firearm proscriptions were in irreconcilable conflict because their penalty schemes differed.

Here, there has only been evidence that Congress intended the new labor legislation to expand on remedies already available. Moreover, the overlap between the two statutes is not complete. At most, the conduct alleged in the complaint may be said to give rise to separate and independent violations of law. Although the element of interference with section 411 rights is included within the Hobbs Act allegation, the material elements of the crime of extortion include additional elements, such as effect on interstate commerce and inducing the victim to part with property. Section 530, on the contrary, requires restraint, coercion, or intimidation and a specific intent to interfere with the exercise of LMRDA rights. As the Ninth Circuit has stated, "The existence of overlapping coverage under other criminal statutes does not diminish the scope of the Hobbs Act." *United States v. LaBinia*, 614 F.2d 1207 (9th Cir.) *cert. denied*, 446 U.S. 969, 100 S.Ct. 2951, 64 L.Ed.2d 830 (1980) (coverage under Hobbs Act and Bank Robbery Act, 18 U.S.C. §2113). Other courts have allowed prosecution under the Hobbs Act even though the alleged criminal conduct might be punishable under a different criminal statute. In *Gerilb, supra*, 603 F.2d at 421.

the Third Circuit concluded that 18 U.S.C §601 is "Congress' attempt to deal with a problem related to but not identical with the problem at which the Hobbs Act is aimed." The Seventh Circuit compared the Hobbs Act with a violation of the Taft-Hartley Act, 29 U.S.C. §186(b) in *United States v. Kramer*, 355 F.2d 891, 896 (1966):

> When the charge under the Labor Act is based on a coercive demand or request by a representative of employees, this conduct may also constitute extortion under the Hobbs Act. The fact that the same conduct may give rise to separate and independent violations of law does not render the charges of convictions based thereon inconsistent or mutually exclusive.

This result is consistent with the broad scope of the Hobbs Act, discussed earlier. As the Supreme Court stated: "Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language." *United States v. Colbert*, 435 U.S. 371, 380, 98 S.Ct. 1112, 1117, 55 L.Ed.2d 349 (1978). Where two statutes overlap, the right of election belongs to the prosecutor. *Batchelder*, *supra*, 442 U.S. at 123-25, 99 S.Ct. at 2203-2205. To the extent that the conduct alleged in paragraph 12(a) does state a cause of action under both section 530 and the Hobbs Act, plaintiff has made its choice of the course to follow.

It bears repeating at this time that the defendant's motion under Rule 12(b)(6) attacks paragraph 12(a) on the basis that it cannot set forth a claim upon which relief may be granted. The defendant's brief assumed for purposes of the motion that the acts of intimidation alleged in the complaint induced the members of Local 560 to part with their section 411 rights. Whether the plaintiff will be able to satisfy all the elements of a Hobbs Act offense is not presently before me.

[5] In sum, therefore, I have determined that section 411 rights are intangible rights which are within the ambit of the Hobbs Act, and that the Hobbs Act is not impliedly repealed by the LMRDA.

Defendant raises as it final objection the point that paragraph 12(a) essentially makes section 530 of the LMRDA a predicate crime under RICO in violation of the express definition of "racketeering activity." However, this misconstrues the nature of the plaintiff's charges. *Cf. Stout, supra*. I have already determined that section 530 does not prohibit the same conduct prohibited under the Hobbs Act, and it is the Hobbs Act which serves as one of the predicate offenses in this action. Furthermore, my research has not produced any evidence that the theory of this case contravenes Congress's intent in passing RICO.

[6] The Senate Report in its analysis of Title IX which was enacted as RICO stated with respect to the infiltration of labor unions by organized crime:

> Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions.[3] Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

S.Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969).[19]

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19. Senator McClellan expanded on his congressional remarks in an article, 46 Notre Dame L. 33, 141 (1970):

> The infiltration of legitimate business by organized crime has been increasingly documented in the past year. Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices. It sometimes uses terror tactics to obtain a larger share of the market. Labor unions are infiltrated, and then labor peace is sold to businesses. This does not inure to the benefit of the workingman. To the contrary, for example, as documented in a grand jury report I inserted in the Congressional Record on December 3, 1969, in New Jersey members of the mob recently required payments from a contractor so that nonunion

The factual basis for the Senate's statement, as disclosed in footnote 5, is to be found in the reports issued by the Select Committee on Improper Activities in the Labor or Management Field over which Senator McClellan presided. S.Rept. No. 1417, 85th Cong., 2d Sess. (1958); S.Rept. No. 621, 85th Cong., 1st Sess. (1959); S.Rept. No. 1139, 85th Cong., 2d Sess. (1960). The McClellan hearings were also the impetus behind the passage of the LMRDA, which history I have already set forth. Therefore, both the LMRDA and RICO were implemented to attack the same problem. In my opinion, neither statute mandates a finding that conduct which is regulated or proscribed under the LMRDA cannot also violate RICO. RICO, like the LMRDA, as earlier detailed, is legislation intended to supplement the panoply of remedies designed to reach racketeering. Further, it is to be liberally construed. *See generally United States v. Turkette*, 452 U.S. 576, 588-89, 101 S.Ct. 2524, 2531-2532, 69 L.Ed.2d 246 (1981); *United States v. Frumento*, 563 F.2d 1083, 1090-91 (3d Cir. 1977) *cert. denied*, 434 U.S. 1072, 98 S.Ct. 1256, 55 L.Ed.2d 775 (1978).

For all of these reasons, defendant's motion to dismiss paragraph 12(a) is denied. An order in conformance with my determination has been filed by the court.

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men could work at lower wages on a project. In business, the mob bleeds a firm of assets, then takes bankruptcy. It steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions. It evades taxes and thereby gains an unfair advantage. It monopolizes goods and services thereby raising prices. Through the violence used in its operations and its rigidly enforced code of silence, as well as exploitation of nonmembers in its schemes, the mob seeks to gain immunity from the rules of our society governing business and labor practices. We cannot afford to allow it to succeed in this endeavor.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
Plaintiff.

v.

LOCAL 560, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, et al.
Defendants.

CIVIL ACTION NO. 82-689

OPINION

W. Hunt Dumont, United States Attorney for the District of New Jersey
By: Robert C. Stewart, Attorney in Charge
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Leopold Laufer, Special Attorney
United States Department of Justice
Newark, New Jersey 07102 For Plaintiff

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Jersey City, New Jersey 07306
For defendant Local 560 and the Severance Pay Plan

Harvey Weissbard, Esq.
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For defendants Provenzano, Sheridan, Dildine, Reynolds, Sciarra and Jaronko

Herbert New, Esq.
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For defendant Trucking Employees of North Jersey Welfare Fund

Mr. Stephen Andretta and Mr. Gabriel Briguglio, Pro Se
ACKERM[illegible], District Judge.

John L. Lewis, former president of the Congress of Industrial Organizations and the United Mine Workers once said that "Labor, like Israel, has many sorrows."

A careful review of the evidence in this unprecedented case reveals the verity of that observation.

It is not a pretty story. Beneath the relatively sterile language of a dry legal opinion is a harrowing tale of how evil men, sponsored by and part of organized criminal elements, infiltrated and ultimately captured Local 560 of the International Brotherhood of Teamsters, one of the largest local unions in the largest union in this country.

This group of gangsters, aided and abetted by their relatives and sycophants, engaged in a multifaceted orgy of criminal activity. For those that enthusiastically followed these arrogant mobsters in their morally debased activity there were material rewards. For those who accepted the side benefits of this perverted interpretation of business unionism, *see* J. Hutchinson, *The Imperfect Union* p. 371, (1970), there was presumably the rationalization of "I've got mine, why shouldn't he get his." For those who attempted to fight, the message was clear. Murder and other forms of intimidation would be utilized to insure silence. To get along, one had to go along, or else.

It is important to state what the evidence in this case does and does not show.

It shows that a trade union which is by origin and nature a voluntary organization is susceptible to the malicious machinations of others, as Congress perceived in enacting the Landrum-Griffin and RICO Acts.

It does not demonstrate that unions or union officials in general are riddled with racketeering or corruption. Most authorities are convinced that the overwhelming number of unions and union officials are "untroubled by the problem of corruption." *Id*. Crooks and racketeers are anathema to a significant portion of the trade union movement. *See id*.; D. Dubinsky & A. Raskin, David Dubinsky: *A Life With Labor* (1977); P. Jacobs, *The State of the Unions* (1963). *See also* "The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*," 58 Notre Dame L. Rev. 237, 303 n. 170 (1982).

As Professor Hutchinson observed in his book *The Imperfect Union—A History of Corruption in American Trade Unions* (1970) at p. 7-8:

> Corruption owes little more to immoral union leaders than it does to predatory employers who, throughout the history of American business, have sought by cheating and violence to circumvent the strictures of competition, unionization and the law. It is a companion of the corruption in politics and law enforcement which for generations has characterized some of the major cities of the nation, sheltering the guilty and embroiling the innocent in crime. It owes a debt to the insanity of Prohibition and its enduring legacy of organized defiance of the law. It thrives in the procedural jungle of the American criminal law. It stems from the social conditions of the cities—from the tensions of an immigrant society, the customs of racial discrimination and ethnic isolation, the miseries of the slums and the frustrations of the underprivileged, the ignorance of the poor and the indifference of the rich. It has, finally, drawn strength from a public philosophy which, in electing for the competitive society, has tended to trumpet only its virtues, according either praise or tolerance to the victors in a battle lightly burdened with rules."

Applying these precepts and the law applicable to this case I find that the record clearly demonstrates that the Provenzano brothers (Anthony, Nunzio and Salvatore) and their group betrayed the membership of Local 560.

David Dubinsky, former President of the International Ladies Garment Workers Union stated in his autobiography that "[r]acketeering is the cancer that almost destroyed the American trade-union movement." D. Dubinsky & A. Raskin, *supra*. The metaphor of disease is apt. *See* P. Johnson, *Modern Times* p. 102 (1983). For reasons set forth below, I have determined in this case, in accordance with law and to secure justice, to use a judicial scalpel to excise this malignancy from this union and its members.

To do any less would be to ignore the laws of the land and do a disservice to the thousands of labor leaders who earn their daily bread by honestly striving to improve the wages, hours and working conditions of their members.

This is an action brought pursuant to the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.*[1] Plaintiff United States alleges, *inter alia*, that Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 560), together with its Welfare and Pension Funds (Funds) and its Severance Pay Plan (Plan),[2] has become, through the actions of the individual defendants, a "captive labor organization." The United States seeks, first, the appointment of a receiver or trustee to serve in the capacity of the Local 560 Executive Board until such time as the membership can freely nominate and elect new officers. The complaint also seeks injunctive relief against defendants Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J.W. Dildine, Stanley Jaronko, Thomas Reynolds, Sr., and Michael Sciarra, *inter alia* barring them from union office until such time as a democratic election of officers by the membership may be held. Finally, the complaint seeks injunctive relief against defendants Anthony Provenzano, Nunzio Provenzano, Stephen Andretta and Gabriel Briguglio, *inter alia* barring them from any further contacts with Local 560.

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1. Chapter 96 of Title 18, 18 U.S.C. §§ 1961-1968, was added to that title by Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941.

2. The Funds have been merged and split several times, the two most recent events being the March 1, 1974 separation of Locals 617 and 641 from the Trucking Employees of North Jersey Welfare Fund (and Pension Plan) and the May 4, 1977 merger of the North Jersey Fund and Plan with that of the Trucking Employees of Passaic and Bergen Counties.

The complaint charges that the "Local 560 Enterprise"[3] is an enterprise within the meaning of 18 U.S.C. § 1961(4).[4] It further alleges that the individual defendants are associated together under the leadership of defendant Anthony Provenzano as the "Provenzano Group," and that this Group conspired, in violation of 18 U.S.C. § 1962(d),[5] to violate, and actually did violate, 18 U.S.C. § 1962(b) and (c).[6]

Specifically, paragraph 12(a) of the complaint alleges that the Provenzano Group, aided and abetted by past and present members of the Executive Board of Local 560 (including defendants Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J. W. Dildine, Thomas Reynolds, Sr., Michael Sciarra, and Stanley Jaronko) unlawfully acquired and maintained directly and indirectly, an interest in and control of the Local 560 Enterprise through a pattern of racketeering activity in violation of § 1962(b) of the Rico Act. This racketeering activity was alleged to have involved murder and the systematic use of extortion, with the latter allegedly consisting of, according to the complaint, "the wrongful use of actual and threatened force, violence and fear of physical and economic injury in order to create within Local 560 a climate of intimidation which induced the

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3. The complaint refers to the nominal defendants (Local 560, the Fund and the Plan) collectively as the "Local 560 Enterprise".

4. 18 U.S.C. § 1961(4) provides:

"enterprise" includes any individual, partnership, corporations, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity....

5. 18 U.S.C. § 1962(d) provides:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

6. 18 U.S.C. § 1962(b) and (c) provide:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

members thereof to consent to the surrender of certain valuable property in the form of their union rights as guaranteed by the provisions of Sections 157 and 411 of Title 29 of the United States Code...."[7]

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7. 29 U.S.C. § 157 is section 7 of the Taft-Hartley Act, while 29 U.S.C. § 411 was enacted as Title I of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) and is referred to as the "Bill of Rights of Members of Labor Organizations." Section 411 provides:

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members, and to express any views, arguments, or opinions, and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interefere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor orgainzation, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(b) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutuent labor organization entitled to such notice, or (ii) by majority vote of the members

The particular acts of the defendants which allegedly created the climate of intimidation which in turn allegedly induced the surrender of the members' rights are set out as subparagraphs (1) through (28)[8] of paragraph 12(a). These alleged

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NOTES (*Continued*)

in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue. —No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. —No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

The Supreme Court has recently noted that the emphasis of § 411 is "on the rights of union members to expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." *Finnegan v. Leu*, U.S. , 102 S.Ct. 1867, 1870 (1982).

8. Subparagraphs 12(a) (26), (27) and (28) were added to the complaint upon application by the plaintiff for leave to file an amended complaint pursuant to Fed.R.Civ.P. 15(a), which application was granted on September 20, 1982.

acts are:

(1) the June 1961 murder of Anthony Castellitto; (2) the August 1961 appointment of Salvatore Provenzano to the position of Trustee formerly occupied by Castellitto; (3) the September 1961 appointment of Salvatore Briguglio—the alleged murderer of Castellitto—to the the position of Business Agent; (4) the February 1963 appointment of Nunzio Provenzano to the position of Business Agent following his January 1963 conviction for extortion; (5) the May 1963 murder of Walter Glockner; (6) the 1964 appointment of Robert A. Luizzi to the position of Business Agent in spite of a record of criminial convictions; (7) the May 1967 appointment of Luizzi to the position of Trustee; (8) the February 1969 appointment of Salvatore Briguglio to the position of Business Agent following completion of a term of imprisonment for extortion; (9) the April 1969 appointment of Nunzio Provenzano to the position of clerk following completion of a term of imprisonment for extortion; (10) the 1970 appointment of Nunzio Provenzano to the position of Business Agent; (11) the 1971 appointment of Thomas Reynolds, Sr. to the position of Business Agent in spite of a record of criminal activity; (12) the 1972 appointment of Nunzio Provenzano to the position of Fund Trustee; (13) the 1972 appointment of Salvatore Briguglio to the position of Fund Trustee; (14) the allowance of frequent visitations by Armand Faugno and Thomas Andretta to the offices of Local 560; (15) the January 1963 appointment of Nunzio Provenzano to the position of Secretary-Treasurer; (16) the 1973 appointment of Reynolds to the position of Fund Trustee; (17) the 1974 resumption of duties as Business Agent by Salvatore Briguglio following completion of a term of imprisonment for counterfeiting; (18) the 1974 appointment of Luizzi to the position of Fund Trustee; (19) the November 1975 appointments of Anthony and Nunzio Provenzano to the positions of Secretary-Treasurer and President, respectively, in spite of a record of convictions for extortion; (20) the February 1977 appointment of

Reynolds to the position of Trustee; (21) the July 1975 appointment of Josephine Provenzano to the position of Secretary-Treasurer following Anthony Provenzano's conviction for the Castellitto murder; (22) the July 1981 appointment of Salvatore Provenzano to the position of President following Nunzio Provenzano's forced resignation as a condition of bail on a labor racketeering conviction; (23) the Executive Board's failure to recover monies wrongfully converted by Anthony Provenzano; (24) the retention of Marvin Zalk as Fund Administrator in spite of payments accepted by him from an insurance company representative during the 1950's; (25) the retention of Ralph Torraco as the Fund's independent certified public accountant in spite of his federal indictment for systematically overbilling the Fund; (26) the extortion of contributions to the defense funds of the Provenzanos and Michael Sciarra from union members; (27) the 1981 appointment of Luizzi to the position of Business Agent; and (28) associations by some of the defendants with Frank "Funzi" Tieri and Matteo Alfredo Ianniello, reputed to be organized crime members.

Paragraph 12(b) of the complaint alleges that the Provenzano Group, aided and abetted by various others of the individual defendants, "unlawfully did conduct and participate, directly and indirectly, in the conduct of the affairs of the Local 560 Enterprise through a pattern of racketeering activity . . ." in violation of §1962(c) of the RICO Act. The "predicate acts" which are alleged to have constituted this pattern of racketeering activity are set out as subparagraphs (1) through (3) or paragraph 12(b). These alleged acts are: (1) the extortion of $17,100 from Walter Dorn and his company (Dorn Transport, Inc. of Rensselaer, New York) in return for "labor peace; (2) the wrongful conversion by defendant Anthony Provenzano, aided and abetted by successive defendant members of the Local 560 Executive Board, of approximately $223,785 in Local 560 funds "by means of false and fraudulent pretenses, representations, and promises, and pursuant to a scheme and artifice to defraud . . ." (3) the wrongful receipt by Provenzano Group members of payments,

loans and other things of value from certain employers (Interocean Services, Inc. and Di-Jub Leasing, Inc.) in exchange for "labor peace", (4) the unlawful receipt by defendant Anthony Provenzano, aided and abetted by Salvatore Briguglio, of certain fees, kickbacks, gifts or things of value in the form of certain Florida real estate because of, and with intent to be influenced with respect to, his actions and decisions relating to the Benefit Fund; and (5) the wrongful receipt by defendant Nunzio Provenzano, together with Irving Cotler and others, as associates of the Provenzano Group, of "labor peace" payments by certain employers, specifically Pacific Intermountain Express Company, Mason and Dixon Lines, Inc., T.I.M.E - DC, Inc. and Helms Express.

Finally, the initial portion of paragraph 12 of the complaint contains the government's §1962(d) allegations. It charges that defendants Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta, Gabriel Briguglio and others associated with the Provenzano Group unlawfully did conspire toghether to violate § 1962(b) and (c) with the end of infiltrating, dominating and exploiting the Local 560 Enterprise.

In its demand for relief, the government requests: (1) that the Provenzano Group be enjoined from having any dealings, directly or indirectly, with any officer or employee of the Local 560 Enterprise or of any labor organization or employee benefit plan as defined in Title 29 about any matter which relates directly or indirectly to the business affairs of the Local 560 Enterprise or other such labor organization or benefit plan; (2) that all current Local 560 Executive Board members—Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J.W. Dildine, Thomas Reynolds, Sr., Michael Sciarra and Stanley Jaronko—be enjoined from acting in any offical capacity for or on behalf of the Local 560 Enterprise; (3) that the court appoint one or more trustees to discharge all duties and responsibilities of the Executive Board of Local 560 and such other tasks as the court may direct; (4) that at an apporpriate time the trustee be instructed to conduct, with the assistance of the Department of Labor and the Department of Justice, a general election in order

to select officers for the Executive Board of Local 560—the election to be structured in such a way as to ensure that the nomination, primary and final selection processes will not be vulnerable to forms of intimidation and will reflect the decision, the government requests, of at least eighty percent of the members who are eligible to vote; (5) that the court permanently enjoin all individual defendants herein from having any future dealings of any nature whatsoever, directly or indirectly, with any officer, agent, representative or employee of the Local 560 Enterprise or any other Labor organization.

There have been a number of proceedings in this matter prior to trial which merit mention. First, a consent order was entered on June 15, 1982 approving the terms of a stipulation of settlement between the plaintiff United States and defendant Anthony Provenzano, *inter alia* prohibiting the latter from "any form of association with any enterprise (within the meaning of Section 1961 of Title 18 of the United States Code), which enterprise seeks, directly or indirectly, to dominate, control, conduct or otherwise influence the affairs of any labor organization or any employee benefit plan (within the meaning of Title 29 of the United States Code)." A similar consent order was entered on September 15, 1982 with regard to defendant Nunzio Provenzano; and, on January 14, 1983, with regard to defendant Thomas Andretta.

Finally, on November 1, 1982 I denied a motion brought by defendant Local 560 pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss paragraph 12(a) of the compliant for failure to state a cause of action. *United States v. Local 560* 550 F. Supp. 511 (D.N.J. 1982). Following a review of the legislative history of both the Hobbs Act, 18 U.S.C. 1951, and of the LMRDA, and relying on *United States v. Boffa*, 688 F. 2d 919 (3d Cir. 1982), I concluded that the rights guaranteed to union members by the LMRDA's Bill of Rights, 29 U.S.C. § 411, are intangible rights which fall within the ambit of the Hobbs Act. I further concluded that the Hobbs Act as construed in this manner was not impliedly repealed by the enactment of the LMRDA, and that conduct which regulated or proscribed by the

LMRDA may also violate RICO[9]. RICO, like the LMRDA, is, I determined, legislation intended to supplement the panoply of remedies designed to reach racketeering. *Id.* at 524-25.

By order dated March 25, 1982, my former colleague the Honorable H. Curtis Meanor directed that the plaintiff's request for preliminary and final injunctive relief be merged pursuant to Fed.R.Civ.P. 65(a)(2), and that the case proceed to final judgement. On May 20, 1982, this matter was reassigned to me from Judge Meanor.

The non-jury trial of this case began on January 25, 1983. The trial encompassed fifty-one days of testimony, lasting through May 17, 1983, the testimony comprising nearly 8,000 pages in transcript form. I have carefully considered the live testimony, the exhibits and deposition testimony admitted at trial, and the arguments of counsel. This memorandum constitutes the court's decision, and includes the court's findings of fact and conclusion of law pursuant to Fed.R.Civ.P. 52(a).

I.

THE PARTIES

Defendant Local 560 is an unincorporated labor association which was originally chartered on May 11, 1911 by the International Brotherhood of Teamsters. It has its offices at 707 Summit Avenue in Union City, New Jersey. As of May, 1982, it had approximately 10,000 members employed by approximately 425 companies in the metropolitan New Jersey - New York area. As such it is a labor organization engaged in an industry affecting interstate commerce within the meaning of Section 402 of Title 29 of the United States Code.

Under its constitution, seven elective officers are charged with managing the day to day affairs of Local 560. These officers

9. I specifically determined that § 530 of the LMRDA does not prohibit the same conduct prohibited under the Hobbs Act. Since allegations of Hobbs Act violations serve as predicate offenses in this action, I found no merit in defendant's argument that paragraph 12(a) in essence made § 530 a predicate crime under RICO in violation of that statute's express definition of "racketeering activity". 550 F.Supp. at 524.

are: a president, a vice-president, recording secretary, secretary-treasurer; and three trustees. These seven officers together constitute Local 560's Executive Board. This Executive Board is generally authorized and empowered to conduct and manage the affairs of the organization between membership meetings.

Defendant Trucking Employees of North Jersey Welfare Fund, Inc. and its Pension Account are located in Local 560's building in Union City. The funds were and are today welfare and pension benefit plans within the meaning of Section 1002 of Title 29 of the United States Code. As such they are subject to the provisions of the Welfare and Pension Plans Disclosure Act (prior to approximately September 2, 1974) and the Employee Retirement Income Security Act (after approximately September 2, 1974).

As noted previously, two other benefit plan entities were merged into the Funds during May of 1977. These were formerly known as the Trucking Employees of Passaic and Bergen Counties Welfare Fund and the Trucking Employees of Passaic and Bergen Counties Pension Fund. Both of these benefit plans were subject to the provision of the Welfare and Pension Plans Disclosure Act at the time of their merger into the Funds.

The Funds are controlled by a governing body which is composed of four trustees appointed by the Executive Board of Local 560 and four trustees appointed by two employer associations whose member companies have collective bargaining agreements with Local 560. The current employee trustees include defendant Salvatore Provenzano, defendant Stanley Jaronko, and defendant Joseph Sheridan.[10]

The Local 560 Officers and Employees Severance Pay Plan is also operated out of Local 560's offices. It is an employee benefit plan within the meaning of Section 1002 of Title 29 of the United States Code in that it provides severance pay benefits to the employees of Local 560. The current trustees of the Plan are Salvatore Provenzano and Josephine Provenzano.

10. Thomas Reynolds, Sr. was a trustee of the Fund as of the time this litigation commenced and for a period after the trial began, but has since resigned.

A brief description of each of the remaining nine individual defendants may be useful at this point. First, Salvatore "Sam" Provenzano has been the President of Local 560 since approximately July of 1981, when the Executive Board appointed him to that position.[11] Prior to that time he had been employed by Local 560 as a Business Agent between approximately November 10, 1959 and August 8, 1961; as a Trustee between approximately August 8, 1961 and November of 1965, and again between approximately January and May of 1966; as President between approximately May of 1966 and November of 1975; and as the Vice-President between approximately December of 1975 and July of 1981.

Joseph Sheridan has been the Vice-President of Local 560 since approximately July of 1981, when the Executive Board appointed him to that position. Prior to that time he had been a Business Agent between approximately July 7, 1972 and September 1, 1978, and thereafter a Trustee between appoximately September 1, 1978 and July of 1981.

Josephine Provenzano has been the Secretary-Treasurer of Local 560 since approximately June of 1978, when the Executive Board appointed her to that position. Prior to that time, she had been employed by Local 560 as an office worker from 1976 until the time of her appointment. Josephine Provenzano is the daughter of defendant Anthony Provanzano and the niece of defendants Salvatore and Nunzio Provenzano.

J.W. Dildine has been the Recording Secretary of Local 560 since approximately 1968, when the Executive Board appointed him to that poistion. Prior to that time he had been employed by Local 560 as a Business Agent between approximately 1963 and 1968.

Thomas Reynolds, Sr. has been a Trustee of Local 560 since February 9, 1977. Before that time, he was employed by Local 560 as a Business Agent Between September 24, 1970 and February 9, 1977. He is the brother-in-law of defendant Nunzio

11. This appointment was presumably made pursuant to the Executive Board's authority to fill officer vacancies which occur during the term of an office.

Provenzano and the father of former Business Agent Andrew Reynolds.

Michael Sciarra has been a Trustee of Local 560 since May 28, 1981. Prior to that time he was employed by Local 560 as a Business Agent Between July 7, 1972 and September 30, 1976, and again between December of 1977 and May 28, 1981. Sciarra has been a member of Local 560 since approximately 1954.

Stanley Jaronko has been a Trustee of Local 560 since July 13, 1981. Befoe that time, he served Local 560 in the capacity of Business Agent between December 12, 1977 and February 19, 1981, and as a Trustee between February 19 and May 28, 1981.

Stephen Andretta, who testified at trial pursuant to a grant of use immunity under 18 U.S.C §§ 6002 and 6003, was a Business Agent for Local 560 between approximately August of 1973 and October of 1976. His membership in Local 560 dates from the early 1950's, and he held the position of shop steward for Local 560 at Eazor Express Co. between the mid-1960's and August of 1973, and again between approximately October of 1976 and 1980.

The evidence at trial indicated that Stephen Andretta had known Salvatore Briguglio for over twenty years as of the early 1970's. Either through Salvatore Briguglio or his brother Thomas, Stephen Andretta met Armand Faugno sometime during the latter 1960's. Around 1971, notwithstanding his position as a shop steward with Local 560, Stephen Andretta had an ownership interest in West End Trucking Company, which was controlled at least in part by Armand Faugno. Further, during the period between approximately 1971 and late 1972, Stephen Andretta and Salvatore Briguglio would not infrequently visit Armand Faugno at the latter's place of business in Jersey City, New Jersey. During the early 1970's, Stephen Andretta also knew Frederick Salvatore Furino, and was friendly with Ralph Pellechia and Ralph Michael Picardo.

On February 22, 1979, Stephen Andretta was indicted in the District of New Jersey, along with Anthony Provenzano, Thomas Andretta, Gabriel Briguglio and Ralph Pelleccia, on RICO charges (specifically 18 U.S.C. § 1962(c) and (d) stemming

inter alia from the demand for and receipt of "labor peace" payments from trucking companies which serviced Seatrain Lines between 1969 and 1977 (Seatrain Labor Peace Payoffs). On July 10, 1979, following his conviction, Stephen Andretta was sentenced to a ten-year term of imprisonment, which he is currently serving. *See United States v. Provenzano*, 620 F. 2d 985, 989 (3d Cir. 1980).

Gabriel Briguglio was a member and officer of Local 84 of the International Brotherhood of Teamsters, which has its offices at 1224 Anderson Avenue in Fort Lee, New Jersey, until March 31, 1980. Local 84 merged with Local 560 in May of 1980.[12]

Gabriel Bruguglio was indicted on February 22, 1979, in the District of New Jersey, along with Anthony Provenzano and others, in the Seatrain Labor Peace Payoffs case. On May 25, 1979, he was convicted of those charges, and on July 10, 1979 he was sentenced to seven years of imprisonment. *United States v. Provenzano*, 620 F. 2d 985, 989 (3d Cir. 1980).

As to the three individual defendants who have entered into consent judgments in this matter, Anthony Provenzano was employed by Local 560 as a Business Agent between approximately 1948 and 1958, as the President between approximately 1958 and May of 1966, and as Secretary-Treasurer between November 24, 1973 and June of 1978.

Anthony "Tony Pro" Provenzano's history is a long one. On November 15, 1960 he was indicted in the District of New Jersey on one count of Hobbs Act Extortion (18 U.S.C. § 1951) relating to the demand and receipt of what is commonly known as "labor peace" payoffs from the Dorn Transportation Company between 1952 and 1959. On July 12, 1963, having been convicted on this count, Anthony Provenzano was sentenced to a term of seven years. Between approximately May of 1966 and 1970 he was incarcerated on that sentence.

During 1962, Anthony Provenzano was indicted again in the District of New Jersey for Taft-Hartley violations (28 U.S.C. §

12. It should be noted that Gabriel Briguglio has as of yet not become a member of Local 560 by virtue of or following the merger of these two Locals.

186) relating to the wrongful receipt of a house from Eastern Freightways Company. These charges were, however, dismissed during 1967.

In 1973, Anthony Provenzano was indicted in the Southern District of New York for conspiracy to violate the anti-kickback statute (18 U.S.C. §§ 371, 1954) relating to a proposed loan from the Utica Teamsters Benefit Fund for the renovation of the Woodstock Hotel. During July of 1978 he was convicted of these charges and sentenced to a four year term of imprisonment.

On June 23, 1976, Provenzano was indicted in Ulster County, New York, along with Salvatore Briguglio and Harold "K.O." Konigsberg, on charges of conspiracy and murder (pursuant to New York Penal Law § 580-A and § 1044) relating to the 1961 death of Anthony Castellitto. On June 14, 1978, he was convicted on the murder count, while the conspiracy to commit murder count was dismissed. On June 21, 1978, Anthony Provenzano was sentenced to life imprisonment.

Finally, on February 22, 1979, Anthony Provenzano was indicted in the District of New Jersey, along with Gabriel Briguglio, Stephen and Thomas Andretta and Ralph Pellecchia on RICO charges in the Seatrain Labor Peace Payoffs case. On May 25, 1977, he was convicted of these charges, and, on July 10, 1979, he was sentenced to a twenty-year term of imprisonment and remanded. He remains incarcerated on that conviction today. *See United States v. Provenzano*, 605 F.2d 85 (3d Cir. 1979).

Nunzio Provenzano, the brother of Anthony and Salvatore Provenzano, was employed by Local 560 as a Business Agent between approximately 1963 and August 6, 1966, as a clerk between approximately 1969 and 1970, again as a Business Agent between approximately 1970 and January 25, 1973, as Secretary-Treasurer between approximately January 25, 1973 and November 24, 1975, and as President between approximately November 24, 1975 and July of 1981.

On December 26, 1961, Nunzio Provenzano was indicted in New York County, New York, along with Salvatore Briguglio and a third defendant, on charges of conspiracy and Attempted Grand Larceny (New York Penal Law § 360 and 1294) flowing

from a scheme to demand what might be characterized as "labor peace" payments from the Braun Company and Hubert J. Braun, Jr. during December of 1961 (Braun Payoff Demand). On January 29, 1963, he was convicted of attempted grand larceny, and, on March 5, 1963, he was sentenced to a term of two to four years. He served this sentence in New York between approximately August of 1966 and February of 1969.

On September 4, 1980, Nunzio Provenzano was indicted in the District of New Jersey, along with Irving Cotler, Salvatore Provenzano, and Michael Sciarra, for RICO violations (specifically 18 U.S.C. § 1962 (c) and (d)) stemming from the wrongful demand and receipt of "labor peace" payments from four trucking companies between 1971 and 1980, a series of incidents often referred to as the "City-Man Labor Peace Payoffs." On May 5, 1981, Nunzio Provenzano was convicted on these charges, and, on July 7, 1981, he was sentenced to a ten-year term of imprisonment. He is presently incarcerated on this conviction.

Finally, Thomas Andretta, the brother of Stephen Andretta, has been a member of Local 560 during several periods since 1955, including from approximately August 30, 1955 through November 31, 1956; from October 29, 1959 through January 15, 1960; from January 10, 1962 through November 29, 1965; and from February 27, 1978 through July of 1979.

On March 31, 1967, Thomas Andretta was indicted in Middlesex County, New Jersey, along with Armand Faugno, for having used threats to injure in the collection of a loan between March 13 and 23, 1967, in violation of N.J.S.A. 2A:105-4 (Middlesex County Loansharking Transaction). *See State v. Andretta*, 61 N.J. 544, 545 (1972). On May 17, 1973, Thomas Andretta pleaded guilty to that charge. On July 10, 1973, he was sentenced to serve from one to two and a half years in prison.

During early 1968, while free on bail in the Middlesex County Loansharking Transaction case, Thomas Andretta was indicted in the District of New Jersey, along with Frederick Salvatore Furino, on charges of Theft from Interstate Shipment, in violation of 18 U.S.C. § 659, relating to the theft of Skil Tools at the Canny Trucking terminal during January of 1968 (Skil Tools theft). Following his guilty plea in that case he was, on or

about April 17, 1969, sentenced to a one year term of imprisonment and remanded.

On July 22, 1971, Thomas Andretta was indicted in the District of New Jersey, along with Salvatore Briguglio, Armand Faugno and three others, on counterfeiting charges under 18 U.S.C. § 371, 472 and 474 (Counterfeiting case). He later pleaded guilty and, on July 10, 1973, was sentenced to fourteen months of imprisonment.

During the early 1970's, except when he was incarcerated, Thomas Andretta, along with Ralph Picardo, was a regular and not infrequent visitor to the Local 560 offices, where he and Ralph Picardo were hosted by Salvatore Briguglio. During roughly this period—between approximately 1970 and late 1972, Thomas Andretta was apparently employed by Armand Faugno.

On February 22, 1979, Thomas Andretta was indicted in the District of New Jersey, along with Anthony Provenzano and others, in the Seatrain Labor Peace Payoffs case. Following his conviction in that matter, he was sentenced on July 10, 1979 to a twenty-year term of imprisonment. *United States v. Provenzano*, 620 F. 2d 985, 989 (3d Cir. 1980). He is currently incarcerated on this sentence.

The other individuals who figure in this matter, but who are not named as defendants, include Robert A. Luizzi, who has been a Business Agent for Local 560 since September of 1978. Prior to that time he was employed by the Local as a clerk between approximately 1960 and 1963, as a Business Agent between 1964 and 1967, and as a Trustee between May 15, 1967 and November of 1980. Luizzi also held the position of Trustee for the Funds from March 12, 1974 until November of 1980.

Salvatore Briguglio had been a member of Local 560 since the 1950's and was employed by it as a Business Agent from September of 1961 to August 3, 1966; from April 25, 1969 to June of 1973; and again from February of 1974 until his death on March 21, 1978. Salvatore Briguglio also held the position of Trustee of the Passaic and Bergen Funds from 1972 until June of 1973 and from early 1974 until January 25, 1975.

On December 26, 1961, Salvatore Briguglio was indicted in New York County, New York, along with Nunzio Provenzano on

the Braun Payoff Demand scheme. He was convicted of Attempted Grand Larceny and was incarcerated in New York between approximately August of 1966 and February of 1969 on that conviction.

On July 22, 1971, Salvatore Briguglio was indicted in the District of New Jersey, along with Thomas Andretta, Armand Faugano and three others, in the counterfeiting case. Following his plea of guilty on these charges, he was sentenced on July 10, 1973 to a term of fourteen months of imprisonment. Salvatore Briguglio was incarcerated on this sentence until approximately February of 1974.

Between the late 1960's and the mid-1970's, except during the periods when he was incarcerated, Salvatore Briguglio often socialized at the Chateau Renaissance Restaurant in Hudson County, New Jersey, a place also frequented by Stephen and Thomas Andretta, Armand Faugno, Frederick Salvatore Furino and Ralph Michael Picardo. Salvatore Briguglio's involvment with Picardo and the Provenzano Group is also exemplied by the fact that during the period of the Seatrain payoffs, Salvatore Briguglio promoted the interests of Picardo by persuading Salvatore Provenzano to facilitate a meeting between Picardo and Thomas Durkin (Seatrain's attorney) so that Picardo could drum up additional business for Picardo's trucking company.

On June 23, 1976, Salvatore Briguglio was indicted in Ulster County, New York, along with Anthony Provenzano and Harold Konigsberg for the 1961 Castallitto murder. On March 21, 1978, while under indictment in that case, Salvatore Briguglio was shot to death on Mulberry Street in New York, New York.

Armand Faugno was indicted on March 31, 1967, along with Thomas Andretta, in the Middlesex County Loansharking Transaction case. *State v. Andretta*, 61 N.J. 544, 545 (1972). On July 22, 1971, Faugno was indicted in the District of New Jersey, along with Salvatore Briguglio, Thomas Andretta and three others, in the Counterfeiting case.[13] During December of 1972,

13. While the exhibits relating to these two indictments may have inadvertently or incorrectly been ruled inadmissible during the trial in this matter, Salvatore Provenzano's testimony provides an alternative basis for my findings of fact on these matters.

while under indictment in both of these cases. Armand Faugno "disappeared."

Ralph Michael Picardo was a member of Local 560, as well as being the principal operating officer of several trucking companies, including Lift Van Transport. Picardo was a friend and associate of Stephen Andretta and had an affiliation with Seatrain Lines.

On February 22, 1979, Ralph Pellacchia was indicted, along with Anthony Provenzano and others, in the Seatrain case. On April 26, 1979, he pleated guilty to related tax charges contained in that indictment. On July 2, 1979, he was sentenced to two and half years of imprisonment.

Frederick Salvatore Furino was, during the late 1960's and early 1970's, a friend and associate of Stephen Andretta, Thomas Andretta, Salvatore Briguglio, and Michael Sciarra, and knew Ralph Picardo. In March of 1968, Furino was indicted in the District of New Jersey in the Skil Tools Case. Later, during the latter part of the 1970's, Furino operated a trucking company which provided non-union labor to the Canny Trucking operation which was under contract to Local 560. On June 11, 1982, the body of Frederick Salvatore Furino was recovered. The crime has never been solved.

Finally, Salvatore Sinno played a prominent role at trial as one of the government's chief witnesses. Sinno, a self-described criminal, was an early associate of the Provenzanos and their friends.

CREDIBILITY FINDINGS

Salvatore (Sam) Provenzano

During the course of his direct testimony Salvatore Sinno was asked about Salvatore Provenzano:

> Q. Did you ever engage in any illegal activity with Salvatore Provenzano?
>
> A. No.
>
> Q. Did you ever talk to Salvatore Provenzano about illegal activity?

A. No.

Q. Mr. Sinno, did you ever receive any instruction from Anthony Provenzano about what you could or should talk to Salvatore Provenzano about?

A. Yeah, they—he never wanted Salvatore Provenzano, to get involved in anything illegal. We discussed that many a times, yes.

Q. Can you tell us specifically what Mr. Anthony Provenzano's instructions to you were?

A. He wanted to keep him more or less clean. He didn't want to get him involved in any way or other in illegal activities.

Q. Did he give you the reason that, as you put it, he wanted to keep Salvatore Provenzano clean?

A. Well, I imagine—

MR. WEISSBARD: Objection.

THE COURT: Don't imagine. Objection sustained. Answer the question.

A. Yes. He mentioned that quite often, in regard, he didn't want Salvatore Provenzano with any kind of a record or anything, but, for the Union's sake.

Sam Provenzano presently is an International Vice President of the Teamsters Union, President of Joint Council #73, and President of Local 560. He thus wields great power on a national as well as local level.

He is intelligent, affable and likeable. Had Sam Provenzano decided to shed the company he has kept for at least 25 years, there is little doubt in my mind that he would occupy a prominent place on labor's scene today.

The evidence is highly persuasive that from the late 50's on into the 70's, Anthony (Tony Pro) Provenzano, ran this union with an iron hand whether in or out of prison or office. Sam and

Nunzio played musical chairs in minding the store for Tony to satisfy the technical requirements of the law.

At some point in the 70's Sam came into his own. With power at his fingertips, he ran the show and still does. Did he stay "more or less" clean as Sinno had testified? He did not. Most of the time he helped to steer the ship the way Tony had wanted it and made sure the same crew remained on board.

I listened in amazement to him persistently proclaim his belief in the innocence of his brothers and other members of this criminal syndicate with respect to various crimes that they had been convicted of or pled guilty to.

Was he naive, blind or deaf? No. Salvatore Provenzano, in my judgement, knows the truth and is oblivious to it.

Why? A revealing answer was provided on April 27, 1983 when he was asked on cross examination:

> Q. Today, given all that has happened with Local 560 and all the indictments and this civil complaint and everything like that, if another indictment came down like the Seatrain indictment, would you, today, hink it a prudent thing as the president of the union to make an inquiry to try and find out what the circumstances were with respect to the union contract and the alleged violation of the contract?
>
> A. To answer your question, yes. If I would have done it by reading the indictment is something else. I think it is prudent. I thought I answered that before, that I started to check out what was going on.
>
> Q. Okay.
>
> A. I never denied that. What I am saying is I didn't bother to read the indictments. But I was interested in what took place.
>
> Q. All right, sir.
>
> Now, I think I understand you. You were interested then--you were interested at the time of Seatrain in what was going on?

A. Yes. Because my brother was involved, and I couldn't see how he was involved in the situation. That was my main concern.

Q. Your brother?

A. Yes, sir?

Q. As opposed to the union?

A. *He comes first*. I will say that.
(emphasis supplied)

He still does. For Sam Provenzano inherited a legacy of corruption which has been preserved by him to this very day. In speaking of Tony in partial response to my question he said: "He would never do anything to hurt this membership."

The record is otherwise.

JOSEPHINE PROVENZANO

Miss Provenzano, daughter of Anthony Provenzano, has been the Secretary-Treasurer of Local 560 since 1978 when she was elected to that office at the age of 23 to succeed her father who had been convicted of murder. She presently earns $64,000 per year plus perks.

She has an engaging personality and has no illusions as to why she was appointed. She said:

A. . . . what motivated them to do that. I have to say it is because — not only that I was a Provenzano, that counts for weight, but I was Tony's daughter. See, there is only one Tony to them. Now, there was a big issue in this case as to what members believe, what they read in papers or don't they believe, were they influenced by it? I have to tell you the truth. *I don't think they would have cared if it was true or not true*. Because they know what he did for them. To them, in their minds, what did the press ever do for me? What did the press ever do for me? What did the government ever do for me? They take my taxes and they go on

about a whole platform of things they disagree with the government. Look what Tony did for me. He gave me pensions, eyeglasses, he gave me dental. I have welfare payments. He saw me on the street and took me in the bar. We had a drink. He remembered my wife's name. He asked me how my daughter was, that had the concussion in the hospital. There is something about my father, sir, — not that you can't get mad at him. You can get mad at him. There is something about the man. I mean you can't understand until you're like one of the guys from 560. They just — I would have never believed it, if I wasn't in those meetings and I didn't hear those people go wild about him. I mean they liked him, but it is just incredible to me. It is just absolutely incredible to me. And to them, I am Tony's daughter. . . .

There can be, to the members of Local 560, no higher recommendation in this entire world. And if I don't believe that, well, I wouldn't be here right now because I wouldn't be a member of the executive board of Local 560.

It is — I don't know how to put it into words. It is more like an emotion you feel. He has an uncanny ability of making people relax, and making them know he cares. He is not a big deal. He is not very well-educated, book-wise. He might have gone to the fourth or fifth grade.

But you give him a contract, he can read it. I don't know how he can read it. He just can. You put him in a room with 500 truck drivers. Nobody in this world is going to talk to them that they will understand more than my father. You put him in a room with ladies, and you never see him. My girlfriends — when my father — there is articles in the papers or — they cry. They call me on the phone in tears. 'How could they say that about your father?'

I tell them, 'Hey, listen, everyone is entitled to their opinion. You know better. Don't cry. Don't get upset. Don't read it. That's all.'

He just commands such love and respect, and admiration and loyalty, not only from his family, but from the members of Local 560. Anyone that comes into contact with him. I don't know what else to say, your Honor. I mean, I don't even know if I expressed myself properly or adequately, but that is just how I feel. I am so proud to be my father's daughter. [Emphasis supplied].

Whatever experience Miss Provenzano lacks, she makes up in candor. Her understandable love for her father transcends everything else.

STANLEY JARONKO

As pointed out previously, Mr. Jaronko has been a member of the Local since 1949 and a business agent since 1977. He was a shop steward for 17 years. He is a trustee of the union and a union representative to the Trucking Employees of North Jersey Fund (TENJ).

He was asked:

Q. Have you, to the best of your knowledge, ever done anything that a member might think was designed to intimidate him from coming to meetings or speaking out his mind?

A. Nope, never did it. Never will.

He was asked:

Q. Mr. Jaronko, if Nunzio Provenzano was able to come back to the union tomorrow, you as one member of the Executive Board would vote him on in a minute, I take it, right?

A. Yeah. I believe there is a law that he can come back. But after he does what is he supposed to do? Yes, I would.

Q. And if that law didn't exist and he could come back tomorrow, you would take him back tomorrow, right?

A. Yes. And I believe the members will, too.

Q. And you would do the same thing with Anthony Provenzano, assuming he could come back tomorrow, you would take him back tomorrow?

A. Yes.

With respect to the Maislin Terminal incident involving Local 560 member August Muller, described *infra*, I find Mr. Jaronko's testimony unconvincing and his version of the story unbelivable.

A careful review of Mr. Jaronko's testimony reveals that, with one exception, he steadfastly refused to accept a verdict of guilty involving the Provenzanos. His rationale — they were convicted on the testimony of an informer.

Overall, I found Mr. Jaronko to be fiercely loyal to the Provenzanos, completely indifferent to the history of criminal activity on the part of various individuals, including Anthony and Nunzio Provenzano. Mr. Jaronko's fealty to the present regime is steadfast beyond question, his testimony left much to be desired.

J.W. DILDINE

A business agent of Local 560 and Recording Secretary since 1968, Mr. Dildine impressed me as an intelligent individual who in restrospect "sold himself to the devil" twenty years ago when he agreed to come to work for Anthony Provenzano as a business agent.

He testified in an extremely lucid manner when confronted with the sordid history of the local and its leaders. He was calm and for a time quite impressive and persuasive.

He testified as follows:

THE COURT: What is your feeling regarding all these involvements affecting Mr. Nunzio Provenzano?

THE WITNESS: My personal feeling is that I would have to judge Nunzio Provenzano as well as Salvatore Provenzano and Anthony Provenzano in my personal contact with them and my personal relationship with them.

THE COURT: Yes, sir.

THE WITNESS: It has always been one of a strict business, from the office. Over the years we had grown, I guess, close because of our business association, within that office.

THE COURT: Yes, sir.

THE WITNESS: Outside of that office, we did no, how would I put it, personal contact where we socialized or whatever. I came on the scene as a, as, the expresssion, a new kid on the block. I had to prove myself. I came in through the appointment of Mr. Anthony Provanzano. I dug in. I worked hard. I tried to repay that appointment by dedication and hard work. So my association with these gentlemen were always above board.

They never asked me to be involved in any kind of skullduggery, nor was I ever aware that there was any skullduggery.

It was strictly, in that office, as even today, these people worked very hard. They put in a lot of hours, and they really tried to do the job for the membership.

So in answer to your question, your Honor, I don't know that there has ever been a time that I, and I have had many conversions with Anthony as well as Nunzio, when he was the President, and even today, Salvatore, and their main concern was and is today getting the job done, and beyond that, I don't know what more I can say.

THE COURT: All right. Would it be fair then to conclude that, insofar as Nunzio is concerned, Nunzio Provenzano, that you don't believe he was ever involved in any skullduggery, to use your expression?

THE WITNESS: To my knowledge, no, sir.

THE COURT: And you believe in his innocence?

THE WITNESS: Yes, sir.

THE COURT: Okay. Now—

THE WITNESS: That was in the June thing. The other one, that is another matter.

THE COURT: Well, I presume that your opinion is the same with respect to the union conviction?

THE WITNESS: Yes, sir.

THE COURT: The most recent conviction?

THE WITNESS: Yes, sir.

THE COURT: All right. You were here when the government produced this Professor Summers, were you not?

THE WITNESS: Yes, sir.

THE COURT: Were you in the room?

THE WITNESS: Yes, sir, I was.

THE COURT: Do you recall him testifying one day that, and I am paraphrasing it now, that, so you will forgive me, Mr. Dildine, that, it's just not natural, based on his expertise in unions, particularly after the state conviction, for nobody to come out and say, 'he done wrong.' Forgive my English.

What is your reaction to that, to someone who is no longer the new kid on the block?

THE WITNESS: My reaction, I was asked I think at the very beginning of my testimony yesterday what my educational background was, and compared to Professor Summers, I guess, my formal education is rather in remiss.

However, I guess, I have had 33 years at the school of hard knocks, and it's to—to try to compare his analyzation from a classroom type of projection, you have to live it, you have to be a part of it.

You have to be on the firing line, you have to be up front. You have to deal with these problems on a daily situation. Mr. Anthony Provenzano is a very unique personality. He has a charisma about him that he could relate to

those people sitting out there in the meetings, in the meeting rooms. To try to dissect what the professor had to say about it, when you asked him what he thought, in his learned position, would be the remedy, his analyzation, without ever meeting me, without every talking to me, knowing me and my background, my family, or any of the other people that I worked with, his immediate response was to remove everybody from office, right now, and appoint a trustee, and through cross examination by Mr. Briguglio, he brought out the fact that he had been offered the job as that trustee by the government.

And I am sitting over there, your Honor, and I am a kid from the poor side of the block, and it's for, for me, it's a frightening thing to be confronted, and to be sitting in this seat here as a defendant and be charged with violations of the Hobbs Act, where I extorted members, and to be in violation of everything that is holy, as far as being a union representation goes.

And to be charged by the United States Government in this, it's frightening, and I will tell you something, I have spent many hours on this, and I could probably walk away tomorrow with a small retirement, but I wouldn't do it under these conditions, because I have never, in my past, have done anything to deserve this type of treatment, not from the Government, or anyone else, or the members that I serve.

THE COURT: Do you feel it is a vendetta?

THE WITNESS: Yes, sir, I do, to the 'nth' degree, I think. I have been associated with the people in my office for some 20 years.

THE COURT: Yes, sir.

THE WITNESS: And there have been convictions. There have been millions of dollars spent, of taxpayers money. They have, they don't have to answer to any for this, to my knowledge.

They have unlimited time. We are here today having to defend ourselves, we have to pay for our own counsel fees, and there are those among us, your Honor, that, we are in financially terrible shape.

Some of us may have to mortgage our homes in order to pay our legal fees. But even in the face of that, I can stand here and I can look at these three gentlemen, eyeball to eyeball. I can look at Mr., what is his name, Dumont, and I can look at you, your Honor, and tell you that I have not, nor have my associates, sitting here today, since we have been in office, violated any law, federal or otherwise. Anybody can sit back and Monday morning quarterback and say, why did you appoint young Josephine or why did you do this. But these were done in good faith, forthright, and whatever, and each one of these things, I have partaken in it, I have participated in it, but I do not bow my head to this court, from actions that I have taken.

Anyone can say, well, look, here was Tony got convicted, Nunzio was convicted, Sal Briguglio was convicted. You brought these people back to work. Why did you do these things? Why was he given a raise in pay? Why was he given a half pension? And all those things, your Honor, if you had the luxury of time, if you could attend one of our meetings, unannounced, and just sit in a corner where they won't know who you were, you would see the response of those members.

It's not choreographed. Our people stand up for what they think they want. We are mandated by their actions. The raise in pay came from them, the half salary came from them, and each one of these items, it was not a frivolous type of action by the executive board or whatever. All these items were checked out legally.

We got legal opinions as to whether or not we could do these things. All these pay raises and whatever, or back pay that was owed. It was reported on the tax report, the LM 2's or whatever.

This is not a secret, your Honor.

These people, they came in here and they try to, they bring in people to testify that I have never met. I don't know anything about them, they don't know anything about me, and yet they would try to sway this court, and you are the judge, and you are the jury and the trier of fact in this, and it will be your opinion, is what will weigh heavy to we as a group, and I say to you, your Honor, that we, as a group, have not indulged as a board, in any kind of violation of our members' rights.

Now, I was rather longwinded, but—

THE COURT: It's all right.

THE WITNESS: But I feel, your Honor, there are things that you must know.

THE COURT: I am interested in this.

THE WITNESS: If feel that—

THE COURT: Tell me about the present President, Salvatore Provenzano. Tell me about him. He is here in the Courtroom?

THE WITNESS: Salvatore Provenzano is the President of our Local Union. He is also the President of the Joint Council for it, in the State of New Jersey.

He has been the Secretary for the Eastern Conference of Teamsters, whose main office is in Bethesda, Maryland and he is also an International Vice President.

THE COURT: Of the International—

THE WITNESS: Of the International.

THE COURT: Right.

THE WITNESS: And he wears many hats, he has a wide variety of responsibilities.

And through the years that Mr. Salvatore Provenzano has been delegated to these authorities, of course, his knowledge, has expanded immensely because he has been exposed to many more things on a national level and the conference level than those of us in the local, of course, are not exposed to.

He has been on the firing line through negotiations, top level. So all these experiences that he has acquired over the years, he has been there I guess since the early 1960 or 1961, so he has had twenty some years as an officer and he was also a member prior to that as a driver, and his expertise has come over the so-called road of hard knocks, too.

He has earned disappointments. He has earned his way.

And those in the higher authority have evidently seen things that his leadership ability and they have appointed him into those offices, originally as a Vice President, International, and since that time, he has also run in elections and he has been re-elected.

So my appraisal of Mr. Provenzano, not because he is sitting here, because over the 20 years we have not always agreed on things.

But we argue these things out at board meetings and we come to a conclusion. He has been one that has always, in my, to my knowledge, has requested the members to take a part, an active part. He even tells us in the board meetings, if you got something to say, say it.

So my association with him has been, as with Anthony and Nunzio, has been always with a great deal of respect, and I hope that the respect is a two-way street.

THE COURT: Is he popular?

THE WITNESS: Yes, sir, he is very popular.

* * *

THE COURT: Okay.

Have you observed any political dissidence insofar as his tenure as a union office holder is concerned?

THE WITNESS: No, sir, I think that over the years, of course, when Anthony Provenzano was first taken away from the membership, and then Salvatore, we call him Sam, so I will refer to him as Sam.

THE COURT: Sam, I gathered that. I am observing the formalities.

THE WITNESS: Sam took over the reins. I think there was a period of time that the members, well, they were, you know—he was Sammy's— Tony's brother, but in a very short time, I think that they recognized his ability and his zeal for the job, and as time went on, of course, he went, he was appointed a general organizer, and then from that, of course, he was made an international vice-president, and of course, this gave our local a great deal of recognition to the rest of the Country.

He was a part of that recognition, because of his dedication to the job, and I think that Sam probably puts as much energy into this job as, and maybe more, than most international vice-presidents.

THE COURT: So what you are telling the Court is he has earned his own spurs?

THE WITNESS: Yes, sir, without question, and I don't say it because he is sitting here.

I did not get the impression that Mr. Dildine was completely comfortable with the role he assumed. History teaches us that every so often those that keep their mouths shut, and eyes and ears closed in the face of evil are called to account. In a way his culpability is greater than most others. He really should have known better. By his inaction he facilitated the spread of the disease. As Edmund Burke stated in a letter to William Smith

dated January 19, 1793, "[t]he only thing necessary for the triumph of evil is for good men to do nothing."

Mr. Dildine spoke glowingly of his father's role in labor's struggles against the Ford Motor Company in the 30's. When he decided to leave his job as a terminal manager in 1963 and accept Tony Provenzano's offer he reflected:

> Q When did your next discussion take place and what did you do about it in the meantime, if anything?
>
> A Well, in the meantime, of course, I had a lot of sleepless nights, I guess you would call it, because I had worked pretty hard at what I was doing, and I was trying to get ahead in life, I guess you would call it, and I felt that the pay would come eventually if I really proved myself out. With the title comes the pay, I guess, but I felt that, well, I would like to get involved in this, and I did a lot of thinking about this, because my history as a young kid, I go back, back in the thirties during the Depression years, and my father, he worked for Ford Motor Company in Detroit, and he was one of the first three men to be fired for union activities back during that period.
>
> And I recalled it and I relived that over and over again, and the fact that he was almost killed several times leading the pickets against, at that time, a company that was so big you just could never beat it. And he was one of the leaders of that strike. He was part of the so-called walkway, where they drop buckets with lead in the bottom on the pickets, when they brought in strike breakers and whatever. And I recall during those days as a kid walking picket lines with my father, and those were hard days, when unions were starting. I never forgot those days.
>
> So that had a lot to do, I think, with my decision, and I thought deeply and I talked with my family about it, and whatever, and it is going to be a whole new change of life, lifestyle, and I also felt that, hey, my father would have been proud of me. So that had a lot to do with it.

It is difficult to reconcile his professed idealism with the record.

SALVATORE SINNO

Mr. Sinno is a former racketeer, one of the murderers of Anthony Castellitto, and was the chief witness against Tony Provenzano and others at the murder trial. In this case he also assumed a prominent role in furnishing the court with a graphic account of how it all began.

His testimony linking Anthony and Nunzio Provenzano to one of the most notorious crime families in New York, and his recitation of a pattern of intimidation and criminal activity which accompanied the takeover of Local 560 had the stamp of credibility. Sinno, a huge man, seemed right out of central casting. As I listened to his tale, it was obvious that this was the real life version of that cinematic presentation "On the Waterfront."

Sam Provenzano in the course of his testimony in exculpating his brother, spoke of various stupid mistakes Tony had made in various criminal entanglements which had landed him in prison. The biggest mistake Tony ever made may have been to initiate Sinno into his criminal fraternity. Sinno's testimony in this case was extremely valuable. The past is truly prologue.

JOSEPH SHERIDAN

Shop Steward since 1963, Business Agent since 1972, Trustee since 1978, and Vice President of 560 since 1981. Mr. Sheridan presented a picture of an individual whose family had taken an active role in the union in the pre-Provenzano period and who had inherited the mantle. Mr. Sheridan appeared to me to feel very comfortable with his earnings of $993 per week. He is not a boat rocker. When asked about Nunzio Provenzano he said:

> A. Sir, if you know Mr. Provenzano, Nunzio Provenzano like I know him, and I know him quite a few years, I don't believe those allegations.

I know him to be an excellent labor leader for his people, a good family man and a man I would be very proud to recognize in the morning. I don't believe them.

Q. And if he were eligible to serve tomorrow, you, as trustee and vice-president of the Local, would bring him back tomorrow?

A. I would be happy to.

When asked about Anthony Provenzano he said:

A. Sir, let me go back. I only served a couple of years with Mr. Anthony Provenzano. I believe he came back in '73 to '78. I was on '72, he wasn't there. So my experience with Anthony Provenzano is only as a member of Local 560 for that period of time.

I know the men idolized him and I can see why they idolized him. He was a man, he come off the trucks the hard way. I don't think that is something, I think I said in my testimony, I said the man has charisma that I wish I had. I don't have it. He is the type of man that can walk in a room with 5,000 hard hats could be in there, and he is well-respected no matter where he goes,because I don't think there is a man in our union, or in the labor movement, that can say anything against him, about this man.

He is a fighter. He fights hard. And I will give you an example like I respect him for. I think he just was incarcerated and he come out for a short time. I think it was a two-week period.

Q. Which incarceration?

A. I think, I don't know if it is on the murder one or on the Seatrain. He was out for about—a couple of weeks. And with all on that man's mind, and any conversation I had with Mr. Provenzano was hello, how are you, and nothing other than that.

I am telling this Court today, your Honor, just the way I feel about this man. I am choked up about it, that is the type of guy he was. He would come down to my desk. He says 'Joey, how are you? I am sorry to hear your wife has cancer.' He says, 'Anything I can do to help you, let me know.' I said, 'I appreciate it, Mr. Provenzano.' He says, 'Hang in there and do the best you can.'

That's the type of guy he is, with all that is on his mind, somebody else might not even think of it, but he thought, just a little something like that, that little charisma like that man has. Tomorrow morning, if you let him out of jail he would win the election overwhelmingly, with all the supervision you want to put up, he would walk away with the election.

THE COURT: If you felt he murdered Castellitto, would you still feel the same way?

THE WITNESS: No, I wouldn't.

THE COURT: Why?

THE WITNESS: If anyone takes anybody's life, I wouldn't even care if it was an animal, I certainly wouldn't respect him or want any part of him or have anything to do with him.

THE COURT: If you felt that he extorted Dorn's, how would you feel about it?

THE WITNESS: I certainly wouldn't respect him or admire him.

THE COURT: Would you vote for him?

THE WITNESS: Excuse me?

THE COURT: Would you vote for him?

THE WITNESS: I would have to weigh that one, sir, because if he was convicted in my conscience, he did something wrong like that, no, I don't think I would.

THE COURT: What about Nunzio's conviction in 1981, if you felt he was truly guilty?

THE WITNESS: If I thought Mr. Nunzio Provenzano was truly guilty of the crime, I know I wouldn't.

THE COURT: You know what?

THE WITNESS: I would not vote for him.

THE COURT: All right.

Let me ask you this. Mr. Dildine testified in this courtroom that he felt the government has pursued a vendetta. I think that was the word he used originally, and then I picked up on it, against Local 560.

THE WITNESS: Yes.

THE COURT: You were in the Courtroom for that?

THE WITNESS: Yes.

THE COURT: Okay. What does the government have to do, in your mind, I am talking about Joseph Sheridan's mind, if I may use the shopworn phrase, to put the ball across the line, to convince you that these individuals who Mr. Laufer has been talking about the last few minutes, were guilty of crimes. What—in other words—let me back up a moment.

Like all of us, I am sure you read the newspapers, right?

THE WITNESS: Yes, sir.

THE COURT: Every day we pick up the paper, we read Joe Smith convicted of murder or robbery in some hamlet in the United States; right?

THE WITNESS: Yes, your Honor.

THE COURT: Okay. You read that article, you don't know Joe Smith, I am assuming that. What reaction do you have, as a normal human being?

THE WITNESS: As reading that in the article. I certainly wouldn't think much of the individual who caused that crime.

THE COURT: Do you think the man has had a trial by a jury, right?

THE WITNESS: Yes.

THE COURT: The jury has deliberated and found him guilty beyond a reasonable doubt.

THE WITNESS: Yes, sir.

THE COURT: Would it be fair to conclude that, on the basis of what you read, the man is guilty? He has been found guilty; right?

THE WITNESS: Yes, sir.

THE COURT: All right. Now, all these cases that we have been talking about, with one exception, I think, I mentioned to Mr. Dildine the plea of guilty by Mr. Sal Briguglio, the counterfeiting case, there were verdicts handed down. Why, in your mind, Joseph Sheridan's mind, do you have a different reaction?

THE WITNESS: Sir, I guess, like you say, if you read something in the paper and you don't know somebody, you are fast to judge an opinion, which we all do. I do it myself.

THE COURT: Right.

THE WITNESS: But I got to tell it to you the way I know it, is that I didn't really know the Provenzanos. I just knew of them being our leaders in the union and I personally, as Joe Sheridan, never really got to know them until I became part of an organization. I can speak for my family, my wife, and I am not just saying that in here, I consider myself a very devout man, a religious man, and I bring my family up this way. I have been in their company on not many occasions. They are respected people in their community. They have lovely children. They brought them up to respect their

parents, and I don't see this aura of, you know, what we are talking about, because I am there almost—I am there 11 years, and I can say that, as God is my judge, all I know these people to be is, no one ever, in the 11 years I am up there, said to me, Joe Sheridan, this is the contract.

Your Honor, I believe you asked me the question yesterday, when you said, can you, as Joe Sheridan, make a decision without picking the phone up? I can tell you companies where—and this is not done in all unions, where if I go out to negotiate a contract and if I know I got the best that I can, I don't have to go to that phone, sir, and I never have.

I will just say, that's the contract. If the people ratify it, I will come in the next day and I will tell whoever the president is at the time, sir, this is our contract. I got this and I got that. That is how I know these people, sir.

THE COURT: I understand that. But as a devout individual, and that is the way you have described yourself.

THE WITNESS: Yes, sir.

THE COURT: Haven't you ever questioned, that is my—haven't you ever questioned in your own mind. I mean aside from the fact that you are on the payroll, and I am being real up front with you—

* * *

THE WITNESS: I am sitting in the courtroom when Mr. Sinno was here, and we are going through testimony, and they are talking about the Mafia, and the 'hit men', and all these here people, you Honor, like I said, unless I am most naive people in the world, I am up there 11 years, I never met that type of individual, I never come in contact with them, and I don't know these people to be anything but good labor leaders, and responsible family men. I will go to my grave saying that.

They are good fighting people for the people they represent. Sure, the things that went on in the past, you can say quarterbacking on a Monday morning, maybe this or that

should have been done, but they try, even to the membership. Sam said to me, he says, we have the contract for the Meadowlands, he said Joey, do you think you can get the Brendan Bryne Arena, he says, I got to try something and see if we can't get this membership out.

* * *

THE WITNESS: Your Honor, you know the hardest thing I think you have to fight, being a member of our Local, you can be invited out for a party, has nothing to do with unions or any union offficials there, and it has happened to me quite a lot. The conversation, what do you do for a living. Business agent for 560. Oh, boy. You know, it is that type of stuff where, I think the papers have done a job, and it is a household word, as far as, you know, I think everyone thinks that this is a racketeer local, and it is a dominated local.

Joseph Sheridan: decent, devout, blind and bought.

MICHAEL SCIARRA

Michael Sciarra has been a member of Local 560 since the mid-1950's. He was appointed a Business Agent in July of 1972, and held that position until 1976. He was reappointed in 1977. He become a Trustee of the union in 1981.

Mr. Sciarra, in very emotional terms, spoke of his love for the union and its members and their love for him. During the course of his testimony, he stressed his devotion to his duties and his desire to do everything which would benefit the membership. Yet, the government was able to demonstrate that his "love" did not cause him to vigorously police Canny Trucking Company, where his good friend Fred Furino was funnelling in non-union drivers for Canny's operation. The situation allegedly came to light only after Mr. Furino was found murdered. Mr. Sciarra testified that he was shocked when he learned of it. As noted elsewhere in this opinion, I am persuaded that his explanations concerning this whole affair were lame.

His love affair with the Provenzanos is more passionate. On that score the record is clear. He was asked:

Q In fact, you stated at your deposition that Anthony Provenzano is your idol; is that correct?

A Yes.

THE COURT: Is your what?

THE WITNESS: My idol.

He was further asked by me:

THE COURT: Now, you recall my question, my question was, do you recall Miss Josephine Provenzano telling the Court, even if all these charges were true, the local union members would welcome back the Provenzanos?

THE WITNESS: Overwhelmingly. Overwhelmingly.

THE COURT: Even if the charges were true.

THE WITNESS: Even if the charges were true.

THE COURT: Would you welcome them back?

THE WITNESS: Yes. I got my own opinions. I am not the same as the members. I told you my opinions and my feelings.

The members would welcome them back with open arms. Nunzie, whom I have known a little better, I got closer to over the years than I did with Anthony, was a hell of a business agent, your Honor.

THE COURT: So that even if, and you have expressed yourself very strongly, and I am not being critical, and very emotionally concerning the charges in which you were involved in and which you were acquitted of. Even if you knew that Nunzio was guilty, and there was no bar, would you bring the guy back?

THE WITNESS: I would definitely vote for him. He would help tremendously.

THE COURT: I was going to ask you why, in other words—

THE WITNESS: Because of his knowledge of the business, his handling of people, he knows how to handle men, and he handles women very well, too, by the way. And I don't mean that facetiously. We have a lot of women we represent. And the women and the men, I have never heard one bad remark about Nunzie Provenzano.

THE COURT: And—

THE WITNESS: I would welcome him back with open hands, any one of them.

THE COURT: That includes Mr. Anthony Provenzano?

THE WITNESS: Yes.

THE COURT: In other words, if you knew, for example, that the charges—if you were convinced that the charges involving the murder of Anthony Castellitto were true insofar as Mr. Anthony Provenzano is concerned, and you had the power, I realize, it sounds—it sounds rather improbable, but I am trying to get your mind set—

THE WITNESS: I understand.

THE COURT: I am trying to find out how you think, Mr. Sciarra. If somehow the doors would open, and Anthony Provenzano would come out—

THE WITNESS: I would pray.

THE COURT: You would what?

THE WITNESS: I pray for that.

THE COURT: You would welcome him back; is that what you are saying?

THE WITNESS: Yes.

THE COURT: I am not trying to put words in your mouth.

THE WITNESS: Yes, I would.

THE COURT: Can you tell me why, assuming you knew that—

THE WITNESS: Providing all the laws permitted him to?

THE COURT: Yes.

THE WITNESS: Again, his leadership, his—I don't know about his knowledge too much any more, being he has been away so much. I know his leadership and the following he had. Man, I would gladly welcome him back, your Honor.

I know he would be a value to the Local Union. The membership alone loves him.

THE COURT: Would that be true with respect to Mr. Stephen Andretta?

THE WITNESS: Stephen, yes. Stephen was a good business agent.

THE COURT: All right. In other words, you don't believe the charges?

THE WITNESS: Your Honor, I know Steve very well. We are very close, him and I. He is one of the reasons for my going down to the Company K a lot, when he was down there.

THE COURT: Okay. If you felt the charges were true, nevertheless, you would welcome him back?

THE WITNESS: If the charges were true on Steve, I would have him back. He doesn't know anything but the trucking business, your Honor. If he is forgiven by the law and by the Lord and he served his time, okay. I will gladly welcome him back.

It is perfectly understandable why Mr. Sciarra supported the motions to vote Mr. Anthony Provenzano a salary increase and a half pension. Mr. Sciarra is an excellent example of how the Provenzano Group has been able to survive and dominate Local 560.

II.

Continuously between approximately the late 1940's and the present, Anthony Provenzano has been the leader of a group of individuals who have been associated together in fact as an enterprise within the meaning of 18 U.S.C. § 1961(4), the activities of which have affected interstate commerce.[14] This group of individuals, the "Provenzano Group," has included (in addition to Anthony Provenzano), Nunzio Provenzano, Stephen Andretta, Thomas Andretta, Gabriel Briguglio, Andrew Reynolds, Salvatore Briguglio (until his murder in 1968), Salvatore Sinno (until his defection in 1961), Harold "K.O." Koningsberg (until his incarcertation in the mid-1960's), Armand Faugno (until his "disappearance" in 1972), Ralph Michael Picardo (until his defection in 1975), Ralph Pellecchia (until his imprisonment), and Frederick Salvatore Furino (until his murder in 1982). The evidence adduced at trial clearly demonstrates that these individuals conspired to and actually did conduct the affairs of the Provenzano Group Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) and (d), involving murder and labor racketeering offenses on a protracted

14. The defendants' assertion that the characterization of the Provenzano Group as an enterprise represents an unfair and prejudicial "last minute" altering of the government's theory of the case is without merit. I find that paragraph 12 of the complaint gave adequate notice to defendants as to this allegation. A mere recharacterization of facts and claims which had been previously fully alleged in the complaint, to harmonize them with changing caselaw, *see* United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), cannot be considered prejudicial. It is, as Judge Wood has stated, "a basic principle of the Federal Rules of Civil Procedure that a litigant is not bound by the selection of a particular theory of relief." Lance, Inc. v. Ginsburg, 210 F.Supp. 272, 274 (E.D.Pa. 1962). Moreover, this theory was fully tried by the government with the implied consent of the defendants. The court may accordingly base its decision on this theory and may deem the pleadings amended accordingly. MBI Motor Company, Inc. v. Lotus/East, Inc., 506 F.2d 709 (3d Cir. 1974); Smith v. Ellerman Lines, Ltd., 247 F.2d 761, 766 (3d Cir. 1957).

I further note that the government has elected not to press the averments regarding the recovery of salary increases (paragraph 12-a-23 of the complaint), the averments regarding Marvin Zalk (paragraph 12-a-24) and those regarding Ralph Torraco (paragraph 12-a-25) in view of testimony that there was reliance upon advice of counsel.

and continuing basis so as to enrich themselves and perpetuate the existence of their criminal association. The evidence further demonstrates that the Provenzano Group has maintained an ongoing organizational structure in the form of a hierarchy and protocol, which has controlled the affairs and conduct of the Provenzano Group's associates during approximately the past thirty-five years. Finally, it has also been conclusively demonstrated that the Provenzano Group has had an existence separate and apart from simply the pattern of activity in which it has engaged.

A.

Sometime during the late 1940's, Anthony Provenzano invited Salvatore Sinno to become associated with him and others in a criminal organization, the Provenzano Group herein. Sinno accepted this invitation. From this association, Sinno learned that the Provenzano Group, operated as an organized racketeering enterprise, and, through its leader, was a faction of a larger New York-based criminal organization. This larger organization was at that time headed by Mike Miranda, who was serving as "acting boss" while its former head Vito Genovese was imprisoned. Prior thereto the organization was led by an individual whom Sinno identified as "Lucky" Luciano.

The larger criminal organization of which the Provenzano Group was a faction had a settled hierarchy. The positions which constituted this hierarchy were "boss," "underboss," "captains," and "soliders," which were also known as "made members" or "button men." Anthony Provenzano was a part of this hierarchy and held the position of "made member" within the larger organization. Others who held such positions during Sinno's period of association with the Provenzano Group included Toby D'Amico, Mike Sabella, Earl Collucio, Tony Salerno, Peter LaPlaca, Bobby Manna, Gyp DeCarlo, Nick Perry, Pete DiFeo and Jerry Catena (the latter four of whom were "captains").

The associates or members of this larger criminal organization were then permitted by its protocol to engage in a variety of

criminal activities, such as gambling, extortion, trafficking in stolen property and the corruption of law enforcement authorities to ignore criminal violations, but were prohibited from involvement in narcotics, prostitution and counterfeiting. Pursuant to the directions of Anthony Provenzano, and apparently in accordance with the larger organization's protocol, Sinno and others participated in the commission of a number of criminal offenses indicative of the relationship between the larger criminal organization and the Provenzano Group. One such criminal offense was the operation by Sinno and others of an illegal monte card game in New York City over a period of several years, from which the larger organization received a "tribute" payment of three percent for having allowed the game to operate. An illegal monte card game was also operated in Hoboken over a period of time which involved the payment of money to law enforcement authorities for "protection." Jersey City was the situs for the operation of an illegal dice game over a several year period prior to 1961, another criminal offense. Anthony Provenzano provided Sinno with $5,000 in operating capital for the Jersey City game in exchange for a ten percent share in the profits.[15]

In September of 1961, Salvatore Sinno disassociated himself from the Provenzano Group. At that time, Nunzio Provenzano was an associate of the Provenzano Group and, like Sinno, had been proposed for full membership in the larger criminal organization. Nunzio Provenzano's involvement in both organizations is highlighted by his presence at the "drop" where, by prearrangement, Sinno "gave up" his truck to be "hijacked."

Following the period described by Salvatore Sinno, the Provenzano Group continued to exist as a racketeering enterprise, notwithstanding the incarceration of Anthony Provenzano between approximately the mid-1960's and 1970 and the incarceration of Nunzio Provenzano (as well as Salvatore Briguglio

15. Anthony Provenzano also caused an employer to place Salvatore Sinno's name on its payroll so that Sinno's tax records would reflect a legitimate source for his income from the various gambling activities seemingly undertaken at Anthony Provenzano's behest. This provides another example of an act consistent with and reinforcing of the organizational structure of the enterprise and which promoted both organizational and individual well-being.

between approximately 1966 and 1969. First, I find that between approximately 1969 and 1977, Anthony Provenzano, Gabriel Briguglio, Stephen Andretta and Thomas Andretta unlawfully conspired to and did conduct the affairs of an enterprise (the Provenzano Group) through a pattern of racketeering activity, again consisting of multiple violations of the Taft-Hartley Act, 29 U.S.C. § 186, and involving both Local 560 and several carriers for Seatrain Lines. Further, between approximately 1971 and 1980, Nunzio Provenzano and others conspired to and did conduct the affairs of an enterprise through a pattern of racketeering activity, again consistng of multiple violations of the Taft-Hartley Act, and involving four interstate carriers.

The continued vitality and viability of the Provenzano Group is further demonstrated by a number of pieces of inferential evidence which, taken together, lend cumulative support to this proposition. First, at a deposition on August 17, 1982, Andrew Reynolds, a Business Agent for Local 560, invoked his Fifth Amendment privilege and refused to answer when asked whether he knew Bobby Manna, and whether he had met with Nunzio Provenzano and Bobby Manna at the Fountain Restaurant and Cafe, located at the corner of Houston and Sullivan Streets in New York City. This meeting, which had lasted for approximately one hour on July 15, 1980, had been observed by the F.B.I. During Sinno's time, Bobby Manna had been a member of the Genovese-led larger criminal organization, and had been a partner of Anthony Provenzano and Salvatore Sinno in the Jersey City dice game. Bobby Manna had also been held in contempt on July 19, 1971 for refusing to answer questions concerning organized crime and racketeering. In *re Manna*, 124 N.J.Super. 428 (App.Div. 1973).[16]

During the August 17, 1982 deposition, Andrew Reynolds also invoked his Fifth Amendment privilege in refusing to answer when asked whether he knew Matthew Ianniello, whether Reynolds reported to Ianniello concerning his activities as an employee of Local 560, whether Ianniello and the "Genovese

16. While I may have inadvertently excluded this opinion from evidence, I may, of course, take judicial notice of it.

Family" control Local 560 through Reynolds and others, and whether he had met with Nunzio Provenzano and Ianniello on Mulberry Street on July 29, 1980. The three had been observed together by the F.B.I. Matthew Ianniello is reputed to be a "captain" in the "Genovese Family" and has been identified as a friend of Anthony Provenzano as well as an acquaintance of Salvatore and Josephine Provenzano and Robert Luizzi. Additionally, Salvatore Provenzano had testified at a deposition on July 29, 1982, and in his testimony at trial that he knew Matthew Ianniello through Anthony Provenzano and considered Ianniello to be a friend of Anthony Provenzano.

Andrew Reynolds further invoked his Fifth Amendment privilege in refusing to answer whether he knew Funzi (Frank) Tieri. Salvatore Provenzano testified at his deposition that Frank Tieri is reputed to be a significant organized crime figure. One of his connections to Local 560 and the Provenzano Group is through Vincent Passaro, who has been a Local 560 Business Agent for Local 84. Vincent Passaro is, according to Thomas Reynolds, reputed to be the "son" of Frank Tieri.

This invocation of the Fifth Amendment privilege by Andrew Reynolds—who was appointed to the position of Business Agent within Local 560 by Nunzio Provenzano and retained in that position by Salvatore Provenzano—is admissible in a civil trial against both him and his coconspirators under Rule 601(d)(2)(E) of the Federal Rules of Evidence, as well as the Executive Board of Local 560. In these circumstances I draw an adverse inference from his silence.[17] See Baxter v. Palmigiano, 425 U.S. 308 (1976). Specifically, I find that had he responded truthfully to those questions, his answers would be incriminatory.

B.

During the past thirty years, Anthony Provenzano and other members of the Provenzano Group have engaged in a pattern of

17. I note that Andrew Reynolds no longer holds the position of Business Agent.

criminal and other improper acts, the object of which was to gain control over and to exploit the Local 560 Enterprise.

First, between approximately January 1, 1952 and June 1, 1959, within the District of New Jersey and elsewhere, Anthony Provenzano, while an official of Local 560, extorted "labor peace" payoffs from Walter Dorn and his company, Dorn Transport, Inc. of Rensselaer, New York. During this period, Anthony Provenzano held the positions of Business Agent, and later, of President, and obtained a total of $17,100 from Dorn.[18]

Next, at the time of his nomination and appointment as a Business Agent for Local 560, Anthony Provenzano directed Salvatore Sinno and Earl Coluccio to attend the membership meeting in question in order to intimidate and if necessary discipline any "rambunctious people"—meaning those members who might presume to voice opposition to his appointment. Similar tactics were employed by the Group in preparation for Local 560's January 10, 1960 election, which was hotly contested. As one such step, Anthony Provenzano directed Nunzio Provenzano, Thomas Reynolds and Robert Luizzi to "sign up" ineligible members in order to increase the Group's voting strength. Salvatore Sinno, at Anthony Provenzano's behest, persuaded some six of his friends to vote for the Provenzano slate in that election, although each of them was, in fact, ineligible to so vote. Salvatore Sinno himself was able to (and did) vote in the 1960 election because Anthony Provenzano had brought Sinno's membership "book" up to date by falsifying entries to show that Sinno was a member of Local 560 in good standing.

Third, in order to enhance his own power and that of the Provenzano Group within Local 560, and apparently to punish what he regarded as a breach of the Group's protocol, Anthony Provenzano recruited Harold "K.O." Konigsberg and Salvatore Briguglio to kill Anthony Castellitto —which they, together with Salvatore Sinno and others, did on June 6, 1961. Prior to his

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18. This pattern was to some extent repeated when, between November 30 and December 12, 1961, Salvatore Briguglio and Nunzio Provenzano attempted to extort labor peace payments (attempted grand larceny) in the Braun Payoff Demand case, discussed *infra*.

"disappearance." Anthony Castellitto was one of the most popular members of Local 560. He had been, for example, the only candidate to run unopposed in Local 560's 1960 election. Anthony Provenzano considered Anthony Castellitto to be a serious threat to his control over Local 560 and felt that Anthony Castellitto might be assisting the opposition party within Local 560.[19]

To carry out Anthony Provenzano's directive, Harold "K.O." Konigsberg enlisted Salvatore Sinno and others sometime shortly before June 6, 1961 to assist him with the planned murder.[20] On June 6, 1961, in Ulster County, New York, Konigsberg, Sinno, Salvatore Briguglio and others killed Anthony Castellitto by striking him on the head with a blunt object and strangling him about the neck with a cord. Thereafter, Anthony Provenzano rewarded Konigsberg for his part in the Castellitto murder by paying him the sum of $15,000. Anthony Provenzano rewarded Salvatore Briguglio for his part in the Castellitto murder by making him a Business Agent in Local 560.

On or about December 20, 1962, approximately one month after Anthony Provenzano had been indicted in the Eastern Freightways case, the membership of Local 560 voted, upon the motion of Michael Sciarra, to increase the salary of its President, Anthony Provenzano, from approximately $20,800 to approximately $43,800 annually. Sciarra testified that his motivation in making the motion was the common knowledge within the Local that Anthony Provenzano faced substantial legal expenses in connection with his defense on the Dorn charges. His salary was again increased on February 14, 1963, and upon the motion of Stephen Andretta, from approximately $43,800 to approximately $95,800 annually. Andretta testified, in turn, that he was prompted to make the motion because of the feeling that Anthony Provenzano should make as much money as Jimmy

19. Anthony Provenzano also expressed the belief that Castellitto had informed on him to law enforcement authorities regarding the "labor peace" extortion of Dorn Transport.

20. Konigsberg, a reputed loan-sharker, at that time operated a "claims collection" agency in the building owned by Local 560 in Union City, New Jersey, and occupied those premises at the sufference of Anthony Provenzano.

Hoffa, who was at the time President of the International Union. Hoffa disappeared on July 30, 1975.

On or about March 13, 1963, Anthony Provenzano announced to the attendees of the membership meeting of Local 560 that he was not taking these two salary increases and would not do anything to improverish the Local. This was again confirmed at the October 13, 1963 membership meeting, when Anthony Provenzano told those attending that, "as of today, I have not taken either of the salary increases granted me." On or about July 21, 1966, the membership of local 560 voted, upon the motion of Michael Sciarra, as seconded by Stephen Andretta, to reduce the salary for the office of the President from $95,000 to $20,800, to be effective with the appointment of Salvatore Provenzano as President on May 6, 1966.

On or about January 30, 1969, Anthony Provenzano (then in prison) caused his attorney, Joseph F. Walsh, to mail a letter to Local 560 requesting that it issue a check to Anthony Provenzano in the amount of $25,000 (less appropriate deductions) "on account of back salary due and owing to him." This letter was subsequently received by the Local 560 Executive Board. As a result of this request, the Local 560 Executive Board paid to Anthony Provenzano the sum of $25,000 annually each year between 1969 and 1976. These payments together represented all but approximately $48,785 of the amount accumulated through his salary increases. During the period encompassed by these payments, Anthony Provenzano did not hold office in Local 560, being in fact disqualified until November of 1975 from holding any union office.

Local 560 received no benefit in exchange for the payment of these funds to Anthony Provenzano. Contrary to his representation to the membership on March 13, 1963, the payments (totalling $223,785) did in fact "impoverish" the Local. His ability to exact these payments from Local 560 provides further evidence of the strength and dominance of the Provenzano Group and its exploitation of Local 560 for its own purposes.

Next, on May 24, 1963, in Hudson County, New Jersey, Walter Glockner was murdered. Prior to his death, Glockner had been a vocal critic and opponent of the Provenzano brothers.

In particular on the evening before his death, during the course of a Local 560 meeting chaired by Salvatore Provenzano, Glockner had voiced opposition to the appointment of J.W. Dildine as a Business Agent. After the meeting, Glockner attempted to approach Salvatore Provenzano in order to further vent his feelings on the matter. As he did so, he became embroiled in a heated exchange and shoving match with Thomas Reynolds. Ralph Pellechia, Local 560's Sergeant-at-Arms at the time, restrained Glockner and forceably evicted him from the premises. The following morning, Glockner was shot to death in front of his residence in Hoboken.

The government at trial produced Manuel Galagarza as a witness. Mr. Galagarza testified that he was a witness to the Glockner murder in 1963. Specifically, he testified that just as he was about to step outside to leave for work at about 6:00 a.m. on May 24, 1963, he heard the sound of a gun shot. He immediately opened his door and stepped outside. Looking across the street, he saw a man holding a gun. The man fired the weapon two or three more times at Glockner, turned around and saw Galagarza, and then jumped into a waiting car and sped away. Galarza at trial identified the murderer as Thomas Reynolds.

Both Galagarza and Reynolds were held in custody for a week as "material witnesses" in the Glockner murder. In spite of seeing Reynolds twice during this period (once at a "line-up" in New York and once at a chance encounter in the Hudson County Jail), Galagarza did not identify Reynolds as the man he had seen shooting Glockner. He explained at trial that he had thus "lied" to the grand jury and others because he had been in fear for his own safety and that of his mother and sisters. Galagarza testified that while he was being held in the Hudson County Jail, one day he found a note under his plate at lunch which read, "Keep your mouth shut." This, he said, only served to reinforce his original decision not to fully reveal what he knew.

Galagarza's decision to testify as to Glockner's murderer's identity came in 1982. Galagarza wrote the FBI expressing a willingness to so testify, allegedly to "get it out of [his] system," particularly given that he had a heart condition and could therefore "drop dead" at any moment. I find that an even greater

motivating factor was the fact of his incarceration. At the time he wrote the letter volunteering his testimony, Galagarza had just begun serving an eight-year sentence on a charge of assault with intent to maim. By the time he testified, he had served approximately sixteen months of this sentence, and had three months to serve before becoming eligible for parole for the first time.

I find Galagarza's identification of Reynolds as Glockner's murderer to be not sufficiently credible to meet the government's burden of proof on this issue. Because Galagarza's testimony was the only proof the government adduced as to the murder itself, I must find that the government has not established the Glockner murder as a predicate act.

During the mid-1960's, Anthony Provenzano consolidated his power and control over Local 560. Shortly after his election victory in 1965, he, Nunzio Provenzano and Salvatore Briguglio commenced serving prison terms resulting from their respective convictions in the Dorn Extortion and Braun Payoff Demand cases. Nevertheless, the Provenzano Group remained strong, and new associates came to prominence. The new associates—Stephen Andretta, Thomas Andretta, Armand Faugno, Ralph Michael Picardo and Frederick Salvatore Furino—were "tied in" to the Group principally through Salvatore Briguglio. Andrew Reynolds was also later brought in through Nunzio Provenzano. Certain of these new associates joined forces with the other members of the Provenzano Group in continuing to further acquire, maintain and exploit control over Local 560.[21] Between

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21. These new associates were also involved in Provenzano Group's 1962 et racketeering activities other than those which focused on the control and exploitation of Local 560. First, during March of 1967, Thomas Andretta, and presumably Armand Faugno, conspired together to use extortionate means (the threat of bodily harm) to collect a debt from an individual in Middlesex County, New Jersey. Second, during 1968, Thomas Andretta and Frederick Salvatore Furino agreed together to steal some $100,000 worth of Skil Tools from a shipment at Canny Trucking Company in Elizabeth, New Jersey, for which each was later convicted. Third and finally, during 1987[1], Salvatore Andretta and presumably Armand Faugno, along with three others, conspired together to violate the laws relating to counterfeiting. Armand Faugno disappeared while both the counterfeiting and extortion charges were pending.

approximately December of 1969 and June of 1977, Anthony Provenzano, Stephen Andretta, Thomas Andretta and Gabriel Briguglio, together with others, unlawfully accepted "labor peace" payments from certain employers—namely, Interocean Services, Inc. (between approximately mid-1969 and mid-1974) and Di-Jub Leasing, Inc. (between late 1974 and early 1977). The specific circumstances of this series of incidents were as follows: (a) Anthony Provenzano and Stephen Andretta were, during the relevant periods, officers and employees of Local 560; (b) Local 560 did represent or would admit to membership employees of these two employer companies; and (c) the payments were made with the intent on the part of the employer companies to secure "labor peace" from Local 560 by influencing the officers and employees of the Local with respect to their official actions and duties. These actions were all in violation of 29 U.S.C. § 186(b) and 18 U.S.C. § 2.

Between approximately early 1974 and late 1977, Anthony Provenzano, aided and abetted by the other associates of the Provenzano Group (and in particular by Salvatore Briguglio and Stephen Andretta), did receive and agree to receive certain fees, kickbacks, gifts and things of value because of and with intent to be influenced with respect to his actions and decisions relating to certain questions and matters concerning the Local 560 Benefit Plan (the Trucking Employees of Passaic and Bergen Counties Welfare and Pension Fund), in violation of Sections 1954 and 2 of Title 18 of the United States Code.

Specifically, sometime before September of 1974, Salvatore Provenzano, then President of Local 560 as well as a Trustee of the TENJ Fund, met Thomas Romano in Florida. Romano there told Salvatore Provenzano that he was interested in obtaining a loan from the Local's benefit fund. Salvatore Provenzano explained the benefit fund loan application procedures and advised that any such application should be sent to Marvin Zalk, the fund

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Shortly thereafter, during 1974, Anthony Provenzano himself agreed with another to violate 18 U.S.C. § 1954 with respect to the payment of a kickback for a loan from the Utica Teamsters Fund.

administrator. As a result, during September of 1974, the trustees of the Passaic and Bergen Fund, one of whom was Salvatore Bruguglio, granted a construction loan of approximately $4.6 million to a company whose principals included Thomas and Frank Romano, in connection with a condominium project in Hallandale, Florida. One month later, during October of 1974, the Passaic and Bergen Fund paid $1,147,000 to KRR, Inc., a corporation whose shareholders consisted of Thomas and Frank Romano and another person, in return for recreational leases on property located in Lauderhill, Florida.

On or about June 18, 1975, Thomas Romano advised the trustees of the Passaic and Bergen Fund that the market was very bad for sales of condominiums in Florida. The Fund therefore renegotiated the terms of the prior loan was in severe jeopardy and default appeared imminent. Stephen Andretta testified at trial that he had no business dealings with the Romanos and that the Romano calls were simply directed to him by the switchboard operator at Local 560 in the absence of Salvatore Briguglio and Paul Campi. He further testified that he merely told the respective callers that the party they were calling was out of the office. The Romanos' telephone bills, however, containing the penciled notations by their secretary showing the name of the "callee," reflect that there were no calls to Salvatore Briguglio during the time period that these calls were made to Stephen Andretta, although they do indicate that Briguglio received various calls both before and after the period in question. I find that it is unlikely that Stephen Andretta's name would have been penciled in had he not been the intended callee—particularly in light of the number of calls for which that notation is found.

Stephen Andretta's testimony is completely unconvincing. I find that his testimony on this matter supports an inference that he deliberately lied in order to conceal the true facts relating to his involvement in the Romano loan transactions.

Further, I find that the circumstantial evidence is strong and convincing that Anthony Provenzano, aided and abetted by Salvatore Briguglio and Stephen Andretta (whose involvement is clear despite the government's specific failure to include him as to this incident in the complaint) engineered the entire Romano

loan/kickback deal for their gain and at the membership's expense. Salvatore Provenzano testified that he remonstrated with his brother when he (Salvatore) learned of the first property sale. While his instincts were correct, his fervor to protect the union membership was subordinated to his brother's will. His brother came first.

Next, continuously between approximately January of 1971 and July of 1980, Nunzio Provenzano, Irving Cotler and others, unlawfully received and accepted and agreed to receive and accept certain payments, loans and deliveries of money and other things of value from certain employers—namely, Pacific Intermountain Express Company (between approximately January of 1971 and July of 1980), Mason and Dixon Lines, Inc. (between approximately November of 1976 and June of 1979), T.I.M.E.-DC, Inc. (between approximately November of 1973 and April of 1979) and Helms Express (between approximately January of 1977 and April of 1979), the employees of which companies were employed in an industry affecting commerce. Specifically, it was found that (a) Nunzio Provenzano and others were officers and employees of Local 560; (b) Local 560 did represent and would admit to membership certain employees of the said employer companies, and (c) the said payments, loans and deliveries were made with the intent on the part of the said employer companies to secure "labor peace" from Local 560 by influencing the officers and employees of Local 560 with respect to their official actions and duties—all of which violated 29 U.S.C. § 186(b) and 18 U.S.C. § 2.

The power of the Provenzano Group and its ability to exploit Local 560 for its own purposes was again apparent in 1979. On or about November 9th of that year, the membership of Local 560 voted to award Anthony Provenzano an annual "pension" which would equal one-half of his salary at the time of his retirement. This step had been necessitated, in the view of the Group, by the fact that a break in service (resulting from his imprisonment between 1966 and 1970 in the Dorn case) had disqualified him from receiving a pension from the Teamsters.

Thereafter, on June 21, 1978, Anthony Provenzano was sentenced to life imprisonment for the murder of Anthony Castellitto. As a result, he was forced to "retire" from Local 560. On November 21, 1978, Nunzio Provenzano told the attendees at a Local 560 membership meeting that the Executive Board had acted on the membership's vote to grant Anthony Provenzano a pension, and he thanked the membership for having supported the motion. Pursuant to this action, Anthony Provenzano received the following amounts as his "pension" from Local 560: 1979-$27,612; 1980-$27,612; 1981-$28,143.

In his testimony, Salvatore Provenzano stated that he had "no idea" how Local 560 would benefit from the payment of this one-half pension. Trustee Michael Sciarra also knows of no benefit to Local 560 which flows from these payments other than to keep "the members happy—they voted for it." The ability of the Provenzano Group to exact these payments is clearly demonstrative of its strength, influence and continuing ability to control and exploit Local 560 for its own purposes—at the expense of the membership. The audacity of these payments in the face of Anthony Provenzano's conviction (and sentence of life imprisonment) for murder is remarkable.

As part of the effort to gain control over and exploit Local 560, continuously throughout the period between June of 1961 and the present, Anthony Provenzano and other associates of the Provenzano Group—aided and abetted by various past and present members of the Local 560 Executive Board—systematically used extortion in order to induce a significant portion or segment of Local 560's membership to surrender certain property. Specifically, this extortion took the form of the wrongful use of actual and threatened force, violence and fear of physical and economic harm, particularly the loss of the ability to earn a livelihood, and it was used to induce or coerce the membership into surrendering their federally-protected rights to participate in the affairs of Local 560 in a democratic manner. This extortion affected interstate commerce and the movement of articles and commodities in such commerce.

The extortion of these intangible property rights occurred through a series of actions committed by the Provenzano Group.

The first of these was the "disappearance" of Anthony Castellitto in 1961. At the time of his disappearance, Castellitto was an extremely popular official of the Local. Although nominally a part of the Provenzano faction, prior to his death he enjoyed the support and confidence of the "Green Ticket," which had vigorously challenged the Provenzanos during Local 560's 1960 election, and which continued to represent a formidable political opposition to the incumbant associates of the Provenzano Group.

Almost immediately after Castellitto's disappearance, rumors circulated among Local 560 members (as well as in the news media) that Salvatore Briguglio—then a known associate and supporter of Anthony Provenzano—had been criminally involved in the incident. As a result, the disappearance generated a perception among the membership that anyone who represented an actual or potential threat to the Provenzano Group's dominance and control over Local 560 ran the risk of physical injury. The nature and intensity of that perception has been such that it survives to the present day and is capable of exerting a substantial influence over the thoughts and actions of the current members of Local 560. It should be noted that no effort has ever been made by the Provenzano Group (or by the Local 560 Executive Board) to dispel this perception.

The extortionate effect of the Castellitto "disappearance" was further amplified or highlighted by the ambush slaying of Walter Glockner in 1963. Again the pattern was repeated: As previously noted, Glockner had, on the night before his murder, spoken out at a Local 560 membership meeting in opposition to a Provenzano Group proposal—even more critically, a proposal to move a Provenzano Group associate into the position of Business Agent. Almost immediately after the murder took place, Thomas Reynolds, Sr. was arrested and held for a number of weeks as a "material witness." This prompted widespread speculation among the membership that Glockner's murder had been the direct result of, and was in retaliation for, his outspoken criticism at the meeting.

One can have a grave suspicion that Glockner's death was caused by the Provenzano Group. As I have previously found, however, the record will not support a finding to that effect, even

by a preponderance of the evidence. But it is clear from a review of the entire record that Glockner's violent demise has been used by the Provenzano Group either directly or subtly as a mechanism of intimidation. For example, it is apparent from the testimony of August Muller that two decades later the members of the Local still have a perception that the Group annihilated Glockner. Even if they did not, this perception has been exploited by the defendants as a means of instilling fear and stifling opposition.

The degree to which perceptions linger that the Glockner murder was an act of retaliation by the Provenzano Group and the dramatic effect that such a perception can have at the present time is illustrated by the August Muller incident, which developed during the course of the trial in this matter.

August Muller has been a member of Local 560 and an employee of Maislin Brothers, a trucking company, for some 23 years. Some months prior to March 23, 1983, Muller had heard Salvatore Provenzano make a statement at a general membership meeting that Maislin Brothers would soon be out of business because the International Brotherhood of Teamsters would insist that Maislin repay certain money which Teamster employees had loaned the company. At approximately 8:00 a.m. on the morning of March 23, 1983, Business Agent Stanley Jaronko visited the Maislin terminal in his official capacity and convened a meeting in the drivers' room. During the course of this meeting, Muller challenged Jaronko with respect to Salvatore Provenzano's position on the loan as well as his prediction regarding Maislin's survival. The exchange became more and more heated until Jaronko (who is 6' 2" tall and weighs 303 pounds) struck the 58-year old Muller (who is 5' 10", weighs about 195 pounds and has a heart condition), sending him into a wall. Approximately eighty or one hundred men and drivers were present during this incident.

Muller, upon being struck by Jaronko, immediately recalled the shooting death of Walter Glockner. He testified that the Glockner murder had always been a subject of conversation among Teamsters over the years.

After the assault, Muller worked a few hours but was too upset to continue working. He went home and took off the following two days. While off from work, Muller went to his doctor, who discovered an elevated blood pressure and bruises on Muller's chest.

While off from work, Muller also tried to get assurances from Local 560 that there would be no physical reprisals against him. When Muller did not receive any such assurances, he went to the offices of the United States Department of Justice to report the Jaronko incident. His purpose for doing so was, he testified, to make a record should he later be physically harmed by the Teamsters.

After returning to work, Muller and Jaronko had a private meeting at which time apologies were exchanged and Jaronko offered to pay Muller for the three days Muller had been out of work. Muller then felt more secure.

Muller was later compelled to testify about the incident at the trial in this matter. He protested vehemently at being forced to testify about his previous report to the government. Throughout his direct and cross-examination, Muller's demeanor evinced the precise attributes of a man in the grip of extreme fear or even sheer terror because of what he was being compelled to say publicly.

The perception which initially flowed from the Castellitto "disappearance" and the Glockner murder gradually developed into a pervasive climate of intimidation within Local 560. An important factor in the process of generating and maintaining this climate of intimidation has been the systematic appointment and reappointment of associates of the Provenzano Group, particularly of those associates who had serious and extended criminal records or whose propensity for violence or criminal activity was otherwise known to those who were principally responsible for the particular appointment as well as the membership. These appointments included:

(a) During September of 1961, Anthony Provenzano and the other members of the Local 560 Executive Board (which then included Salvatore Provenzano) appointed Salvatore

Briguglio to the position of Business Agent — notwithstanding the fact that Anthony Provenzano then knew that Salvatore Briguglio had murdered Anthony Castellitto, and notwithstanding the fact that rumors to that effect were circulating among the membership at that time.

(b) On or about February 1, 1963, Anthony Provenzano and the other Executive Board members (including Salvatore Provenzano) appointed Nunzio Provenzano to the position of Business Agent — notwithstanding the fact that three days earlier, on January 29, 1963, Nunzio Provenzano had been convicted (together with Salvatore Briguglio) of an offense involving a payoff demand.

(c) In 1964, Anthony Provenzano and the other Executive Board members (including Salvatore Provenzano) appointed Robert A. Luizzi to the position of Business Agent — notwithstanding the fact that Luizzi had been convicted in 1943 of a felonious assault and battery and in 1949 of felonious breaking and entry, and had been arrested on four separate occasions thereafter in Hudson County of Disorderly Person, Aggravated Assault, Deadly Weapon and Aiding and Abetting a Robbery.[22]

(d) On or about May 15, 1967, Salvatore Provenzano and the other Executive Board members appointed Robert A. Luizzi to the position of Trustee — notwithstanding his criminal record as outlined in (c) above.

(e) On or about April 25, 1969, Salvatore Provenzano and J.W. Dildine and the other members of the Local 560 Executive Board appointed Salvatore Briguglio to the position of Business Agent — notwithstanding the fact that Salvatore Briguglio had just completed the term of imprisonment for his 1963 conviction in New York State.

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22. While there is no direct evidence in the record which discloses that the membership was aware of Luizzi's past record, I do find some circumstantial evidence of it.

(f) On or about April 25, 1969, Salvatore Provenzano, J.W. Dildine and the other Executive Board members appointed Nunzio Provenzano to the position of "clerk" at the uniquely high salary of some $18,000 per year—notwithstanding the fact that Nunzio Provenzano had just completed the term of imprisonment for his 1963 conviction in New York State, and was forbidden by the terms of his parole from being an officer in the union.

(g) In 1970, Salvatore Provenzano, J. W. Dildine and the other Executive Board members appointed Thomas Reynolds, Sr. to the position of Business Agent — notwithstanding the fact that Thomas Reynolds, Sr. had pled guilty in 1948 to misdemeanor assault (having been charged with felonious assault), had been convicted in 1958 of felony robbery and had been arrested on five separate occasions for rape (1948), grand larceny (1952), rape (1961), armed robbery (1961), and as a material witness (and, in the minds of some, suspect) in the murder of Walter Glockner (1963).

(h) In 1970, Salvatore Provenzano, J.W. Dildine and other members of the Local 560 Executive Board appointed Nunzio Provenzano to the position of Trustee of the Trucking Employees of Passiac and Bergen Counties Pension and Welfare Funds — notwithstanding the fact of his previous conviction and incarceration in New York State.

(i) In 1972, Salvatore Provenzano, J.W. Dildine and the other Executive Board members appointed Salvatore Briguglio to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Pension and Welfare Funds — notwithstanding the fact of his conviction and incarceration in New York State, and notwithstanding the fact that pervasive rumors had linked him to the "disappearance" of Anthony Castellitto.

(j) On or about January 25, 1973, Salvatore Provenzano, J.W. Dildine and the other Executive Board members appointed Nunzio Provenzano to the position of Secretary-Treasurer — notwithstanding his prior conviction and incarceration.

(k) On or about September 12, 1975, Salvatore Provenzano, J.W. Dildine and other members of the Executive Board appointed Thomas Reynolds, Sr. to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Pension and Welfare Funds — nothwithstanding his criminal record and rumored involvement in the Glockner murder.

(l) In February 1974, Salvatore Provenzano, Nunzio Provenzano, J.W. Dildine and the other members of the Local 560 Executive Board reappointed Salvatore Briguglio to the position of Business Agent — notwith-standing the fact that Salvatore Briguglio had just completed a term of imprisonment on a federal counterfeiting conviction.

(m) On or about March 12, 1974, Salvatore Provenzano, Nunzio Provenzano, J.W. Dildine and the other members of the Local 560 Executive Board appointed Robert A. Luizzi to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Welfare and Pension Funds — notwithstanding his criminal record as outlined above.

(n) On or about November 24, 1975, Salvatore Provenzano, J.W. Dildine and the other Executive Board members appointed Anthony Provenzano and Nunzio Provenzano to the positions of Secretary-Treasurer and President, respectively — notwithstanding the fact that Anthony Provenzano had been convicted of labor racketeering and Nunzio Provenzano had been convicted of a felony involving a payoff demand

(o) On or about February 9, 1977, Anthony Provenzano, Salvatore Provenzano, Nunzio Provenzano, J.W. Dildine and the other members of the Executive Board appointed

Thomas Reynolds, Sr. to the position of Trustee of Local 560 — notwithstanding his criminal record and his rumored involvement in the Glockner murder.

(p) In 1981, Nunzio Provenzano, Salvatore Provenzano, Joseph Sheriden, Josephine Provenzano, J.W. Dildine, Thomas Reynolds, Sr., Stanley Jaronko and Michael Sciarra, as members of the Executive Board of Local 560, appointed Robert A. Luizzi to the position of Business Agent — notwithstanding the fact that Luizzi had a criminal record involving crimes of violence, and notwithstanding the fact that Luizzi had been identified in sworn testimony as having solicited labor peace payoffs or bribes from Helms Express, a trucking company then under contract with Local 560.

This pattern of appointments and reappointments following convictions and incarceration, as well as the related pattern of criminal offenses committed while in office, is, according to testimony I deem credible, unique to Local 560 and unparalleled in the history of United States labor organizations. I find it to be a shameful horror story, the effect of which has been the extortion of the membership's LMRDA-created property rights to union democracy, and the creation, as a result, of a Provenzano Group "fiefdom" within Local 560.

Another factor in the process of generating and maintaining the climate of intimidation within the membership of Local 560 has been the conspicuous and studied indifference of the Provenzano Group, and particularly of its associates who held officer positions in Local 560, to the frequent presence of known or reputed criminals and "undesirables" around the Local's offices. The fact of this presence tended to foster a perception among the membership that the incumbant officers and the Provenzano Group had available to them the support and resources of persons who were not adverse to the use of criminal methods in attaining their desired results. These visitors included:

(a) Thomas Andretta, the brother of Business Agent Stephen Andretta, who had been convicted of the use of extortionate means in the collection of debt in Middlesex County in 1967 (indicted together with Armand Faugno), the theft of Skil Tools from the Canny terminal during 1968 (convicted together with Frederick Salvatore Furino), and counterfeiting during 1971 (convicted along with Salvatore Briguglio, Armand Faugno and three others). In addition, Thomas Andretta had been convicted in or around 1960 for theft from Interstate Shipment. Notwithstanding these convictions, Thomas Andretta was a frequent visitor at the office of Local 560 during the late 1960's and early 1970's.

(b) Armand Faugno had been convicted in 1967 with Thomas Andretta in the Middlesex County Loansharking Transaction and with various other in the 1971 Counterfeiting case. In spite of this record, Faugno sometimes visited the offices of Local 560 before his disappearance in December of 1972. While there is no evidence introduced at trial that Faugno was known to any rank and file member of local 560 who might have been visiting the office at the same time, word of his relationships with Provenzano Group associates most certainly spread among certain segments of the membership following his disappearance while under indictment together with Thomas Andretta and Salvatore Briguglio.

Another factor in the process of generating and maintaning the climate of intimidation within Local 560 has been the calculated refusal of the Provenzano Group incumbents (as well as the other members of the Executive Board) to take such steps and measures as are reasonably and logically necessary to counter adverse perceptions.

Specifically, there is widespread public perception that Local 560 and its leadership is "racket ridden." Within the union, there has long been a perception that certain current and former Executive Board members and business agents have a widespread and continuing repuation for the use of physical violence and economic retaliation against those who oppose them. These

members include Anthony Provenzano, Salvatore Provenzano, Nunzio Provenzano, Thomas Reynolds, Sr., Stanley Jaronko, Salvatore Briguglio, and Andrew Reynolds. The testimony of Special Agent Wren in this regard, which I find credible and probative as to the state of mind of the membership, is, I find, merely the "tip of the iceberg." Additionally, Anthony Provenzano, Nunzio Provenzano and Salvatore Briguglio have long been publicly reputed to be members of the "Genovese Crime Family." Andrew Reynolds has also had contact with reputed members of this larger criminal organization. Neither the Executive Board nor the Provenzano Group have done anything to counter these perceptions. Instead:

— Notwithstanding these perceptions, the Executive Board of Local 560 appointed Anthony Provenzano to the position of Secretary-Treasurer in November of 1975.

— Notwithstanding these perceptions, on July 5, 1978, the Executive Board appointed Anthony Provenzano's daughter Josephine Provenzano to fill the position of Secretary-Treasurer for the unexpired term of her father as his surrogate, upon the latter's conviction in Ulster County, New York, for the 1961 murder of Anthony Castellitto.

— Notwithstanding these perceptions, following the labor racketeering conviction of Nunzio Provenzano during May of 1981, the Executive Board (then including Salvatore Provenzano, Josephine Provenzano, J.W. Dildine, Sr. and Stanley Jaronko) took no action to remove him from the position of President. This was so despite the fact that his federal conviction in the "City-man" case involved a direct, protracted and egregious breach of trust vis-a-vis the membership of Local 560.

— Notwithstanding such perceptions, in July of 1981—following the resignation of Nunzio Provenzano which had been forced upon him as a condition of bail—the Executive Board appointed Salvatore Provenzano to the position of President. This appointment was made despite the fact that

> Salvatore Provenzano had held the position of President between May of 1966 and November of 1975, during part of which period Anthony Provenzano and Nunzio Provenzano had committed separate labor racketeering violations involving Local 560, namely the "Seatrain" and "City-man" cases respectively.

Thus, not only had the Executive Board failed to take any steps to counter such adverse perceptions, its actions can only be said to reinforce them, confirming the membership's worst fears.

The pervasiveness of the climate of intimidation within Local 560 and the intensity of its impact upon the membership's ability or willingness to exercise their "union democracy" rights under the LMRDA are evinced by the complete absence of publicly voiced opposition to, disagreement with or critical discussion of the (non-contract related) policies, proposals, decisions and actions of the Provenzano Group incumbents. According to the testimony of Professor Clyde Summers, which testimony I credit, the true test of union democracy is whether the members feel free to openly criticize the policies and practices of the incumbents, and not merely whether there are any opposition candidates. There have been a large number of occasions in the recent history of Local 560 during which an objective observer might have expected to hear such criticism or discussion at membership meetings. For example, the murder of Walter Glockner on the morning after his public display of opposition at a union meeting, and the subsequent arrest and detention (for several weeks) of Thomas Reynolds as a material witness in the murder, should have been "fodder" for the opposition in 1963 and should still be "fodder" today, particularly in light of the Local's history. The evidence suggests that the question of Glockner's murder has never been raised at a membership meeting, at least not since 1965.

Further, Professor Summers also testified that the conviction of an official on a union-related offense will normally trigger criticism or even encourage the opposition to come forth and make a challenge. The failure of an Executive Board to take any

remedial action when a responsible official is indicted or convicted can only add fuel to such a situation. Professor Summers noted that it would matter little that such an offense related to a union other than the one in which the defendant was an official (such as was true in the Braun Payoff Demand case). To have appointed persons who are prepared to raid a union is "to bring foxes into the henhouse." Consequently, anyone who is appointed by a person who was himself sent to jail for selling labor peace should normally be a target of criticism. There has, of course, been no such criticism within Local 560 since the emergence of the Provenzano Group.

The payment by the Executive Board of the accrued salary increases to Anthony Provenzano while he was incarcerated for the murder of Anthony Castellitto (1969-1979) is another example of conduct which Professor Summers identified as of the type which normally would raise protests and opposition. Another is the appointment of Josephine Provenzano to the office of Secretary-Treasurer. The complete absence of such criticism is an indication that members of Local 560 do not have a feeling of freedom in their ability to exercise their rights. Given the issues which should have triggered dissent and opposition, the history of Local 560 is, according to Professor Summers, unparalleled for its absence of both contested elections and other criticism or opposition. This "silence" has been both deafening and damning. The situation is incomprehensible without the explanation that the members are too much in fear to raise their voices.

This is not to deny the fact that some members of Local 560 are content and may even earnestly support the Provenzano Group and its control over the Local. It is equally clear that there are many members who remain apathetic much of the time. There are also, however, dissatisfied members at any given point in time. Notwithstanding the existence of these dissatified members there has not been any publicly voiced opposition or dissent with Local 560 since the 1965 election. The absence of even so much as a "peep" in the face of the history outlined herein leads me to find that a significant number of Local 560 members are in fear of the Provenzano Group, that they are in fear for their jobs and their physical safety, and that through this fear the members

were induced by the Provenzano Group, aided and abetted by the other individual defendants herein, to part with their LMRDA-created union democracy rights.

I do not base these findings on (nor can I be critical of) the average attendance or turnout at the Local's membership meetings. As the evidence discloses, this average turnout is generally within the pattern experienced by the labor movement as a whole. These meetings are, however, qualitatively different from the average. For example, this court viewed a videotape of a recent Local 560 membership meeting. When it came time for a vote to be taken, the leaders of the local deliberately turned their backs to the membership, presumably to demonstrate that democracy reigned in the union hall. I find this act to be a superficial manifestation, bordering on the ludicrous and at war with the true state of affairs within the Local.[23]

C.

The associates of the Provenzano Group — including today Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta, Gabriel Briguglio and Andrew Reynolds — have conspired to participate in the conduct of the affairs of the Provenzano Group Enterprise through a pattern of racketeering activity. Furthermore, these same individuals did also agree together to acquire and maintain control of the Local 560 Enterprise through a pattern of racketeering activity.

23. The process of exercising funsamental democratic rights in opposition to incumbents—such as publicly voicing opposition to their policies or promoting the candidacy of others—may reasonably be expected to engender in the mind of the individual union member a certain degree of apprehension about the potential risks involved: The member may make a fool of himself in speaking out publicly. He may lose status with his peers for being critical. He may incur the enminity of the incumbents and sacrifice their support should a job problem aride. Ther is, however, a point at which the potential for ectreme and unjustifiable adverse consequences incidental to the exercise of basic democraitc rights becomes so great that the resulting apprehensions intensify to a degree which transcends the bounds of what is normal and permissable under ordinary circumsatnces and assumes the dimension of wrongful and unjustifiable fear akin to terror. That critical point has been reached with resoect to the climate of intimidation within Local 560.

The associates of the Provenzano Group well understood its nature, scope and purpose. These individuals knowingly agreed to conduct its affairs through the commission of diverse offenses, including organized gambling, hijacking, extortion, and the infiltration and exploitation of a labor organization through murder, intimidation, fraud and corruption. As described by Salvator Sinno, the Provenzano Group began its activities as a wholly illicit and criminal enterprise in which each associate accepted orders and assignments from Anthony Provenzano and each was prepared to collaborate with other associates in carrying out particular assignments.

One of these associates was Salvatore Briguglio, who participated in the Castellitto murder at Anthony Provenzano's behest and accepted the reward of union office in return. Another such associate was Nunzio Provenzano, who later participated with Salvatore Briguglio in the Braun Payoff Demand, and with various others in the City-man Labor Peace Payoff. The City-man scheme lasted nine years, and involved the systematic and repeated shakedown of four trucking companies under Local 560. The remaining living members of the Provenzano Group—Stephen and Thomas Andretta and Gabriel Briguglio—joined Anthony Provenzano in the "labor peace" payoffs from Seatrain Line's carriers, a scheme which lasted for over seven years.

The particular offenses committed by the associates of the Provenzano Group in conducting its affairs and in acquiring and maintaining control over Local 560 were all of a conspiratorial nature and include the following: (1) the hijackings (late 1940's); (2) the Dorn extortion (1952-59); (3) Sinno's gambling operations (1950's-1961); (4) the Castellitto murder (1961); (5) the Braun Payoff Demand (1961); (6) the Middlesex County Loansharking Transaction (1967); (7) the Skil Tool theft (1968); (8) the counterfeiting case (1971); (9) the Romano loan kickback (1974-77); (10) the Woodstock Hotel conspiracy (1974); (11) the Seatrain "Labor Peace" payoffs (1969-77); and (12) the City-man "Labor Peace" payoffs (1971-80). The commission of these offenses indicate that the Provenzano Group has a scope, diversity and viability which transcends that of any single conspiratorial transaction. These offenses have so many points of commonality

as to parties, victims, methodology, purpose and duration that no mere coincidence could account for their occurrence. Taken in conjunction with Sinno's description of the takeover of Local 560, these offenses demonstrate that each associate of the Provenzano Group, like Sinno, had a conscious dependence upon the other associates and particularly upon Anthony Provenzano for his own continued well-being.

The commission of these offenses, together with the testimony at trial, also indicate that each of the Provenzano Group associates understood its scope and nature, and knowingly, willingly and even enthusiastically joined the conspiracy. With the exception of Ralph Michael Picardo (1973) and Salvatore Sinno (1976), no associate of the Provenzano Group has defected and reported the facts of the conspiracy; despite the past and present incarceration of various of its members, not one of the Provenzano Group associates has voluntarily come forward to renounce and withdraw from the conspiracy.

D.

Local 560 has been, since 1961, and continues to be a captive labor organization, which the Provenzano Group has dominated through fear and intimidation and has exploited through fraud and corruption. The Provenzano Group has used its control over Local 560 to victimize both individual members of the Local and segments of the trucking industry. This victimization has taken the form of multiple violations of 18 U.S.C. § 1962, and these violations are likely to reoccur as long as Local 560 remains a captive labor organization.

Although several key associates of the Provenzano Group are incarcerated, the constellation of facts known about the Provenzano Group, derived from Salvatore Sinno's testimony, from the facts surrounding each of the many prosecutions over the past twenty-two years, and from the other testimony at trial, belie any expectation that it is defunct or even moribund. Given the resilience which it demonstrated during the late 1960's—while three key associates (Anthony Provenzano, Nunzio Provenzano and Salvatore Briguglio) were incarcerated—the

facts lead inescapably to the conclusion that various nominees and successors will continue the Provenzano Group's "criminal business" as usual. Yet another generation of extortionists can be expected to be recruited to fill-out the slightly depleted ranks of the Provenzano Group—unless and until the conditions within Local 560 which spawned and nurtured the events of the last twenty-two years are dramatically altered.

This proposition finds support in Sinno's testimony that the Provenzano Group as he knew it had a scope, purpose and methodology which were calculated to ensure its continued viability as a criminal venture. Additionally, the fact that since the formation of the Group over thirty years ago, only Sinno and Picardo have renounced their membership in the conspiracy bespeaks a degree of internal discipline, loyalty and perseverance which is most impressive, particularly given the number of convictions and years of incarceration that have resulted from its activities. Indicative of this discipline and loyalty was the performance of Stephen Andretta during the trial of this matter. Notwithstanding that he was under consideration for parole, he demonstrated no remorse, contrition or rehabilitation on the witness stand, even under a grant of immunity. Instead, he repeatedly and steadfastly denied the predicate facts of each and every essential element of the very offense of which he stands convicted. When confronted with the transcript of the testimony which resulted in his conviction, he pled a total failure of recollection that the testimony in question was ever given, which effectively served to preclude further inquiry. His memory was, in contrast, remarkably clear as to certain other matters, including, for example, remembering the precise day of the week (Tuesday) when the F.B.I. searched his file cabinet at the offices of Local 560 over seven years earlier (on December 2, 1975).

The Muller incident provides further support for the proposition that the pattern of racketeering violations and concomitant misconduct in office will continue. During the pendency of this action, in fact during the trial itself, when the defendants herein would have been presumed to be exercising particular care as to their conduct, Business Agent and Trustee Stanley Jaronko assaulted August Muller, a Local 560 member who had

publicly voiced criticism of Salvatore Provenzano. While the exact words spoken by each may be in contention, the salient facts are undisputed that a heated verbal exchange occurred as a result of Muller's criticism, and that Jaronko delivered a blow which nearly drove the victim to his knees. Although Muller recovered from the physical trauma within a matter of days, he remained in the grip of terror over the prospect of a Glockner-type retribution—a terror which was manifested during his testimony at trial exactly seven weeks latter.

Further, notwithstanding the convictions in the Seatrain and City-man cases—both involving protracted and systematic "labor peace" payoff schemes—the current Executive Board has done nothing whatsoever to devise and implement procedures and safeguards which might reasonably be expected to discourage or detect similar future abuses by employers and employee representatives. In particular, Salvatore Provenzano, who has been the principal officer within Local 560 throughout most of the period since 1966, has systematically and adroitly eschewed every opportunity to learn the particulars of (or at least admitting knowledge of) the government's allegations and the pertinent judicially determined facts of past violations—all of which might easily enable him to devise prophylactic and remedial measures to prevent or minimize the possibility of future racketeering violations involving Local 560. In fact the opposite was the case: he rewarded and encouraged this improper and illegal conduct.[24]

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24. During the course of the trial, the court raised the mquestion of what internal procedures the union leadership had taken to prevent illegal activity on the part of any representative of the local union. Sam Provenzano testified that he had sleepless nights trying to think of some way to do this. Perhaps he might have taken some guidance from David Dubinsky, who states in his book, *supre* at 117:

> I don't think anyone can cure graft completely, but we made a strong effort to. I am proud of what we did . . . . I had in my desk all the time the undated resignation of every officer just to protect the union if we had trouble of that kind. In the thirty-four years I was president and the two years before that as secretary-treasurer, a total of ninety-three people had to be dismissed from the office for taking money fdrom employers.

Specifically, when asked on direct examination whether he was familiar with the Dorn case, Salvatore Provenzano replied, "absolutely." On cross-examination, however, he testified that while he was present during Walter Dorn's testimony, he did not hear Dorn testify that Anthony Provenzano and Anthony Castellitto had demanded payoffs. As to the Seatrain trial, Salvatore Provenzano claimed to have attended parts of it and heard Ralph Picardo's testimony—even having reviewed Picardo's testimony in that case. When confronted with a transcript of Picardo's testimony, however, Salvatore Provenzano's recollection could not be refreshed regarding the fact that Picardo had identified Salvatore Provenzano as one of his criminal "associates." In testimony on the following day, April 27, 1983, Salvatore Provenzano denied that he had ever reviewed Picardo's testimony in the Seatrain case. Later still, he insisted that he was not very familiar with the facts of the Seatrain case, and stated that he had never taken the time to read the indictment. He also had "never bothered" to have anyone explain the Seatrain indictment to him, and did not believe that it was incumbent upon himself or prudent to do so.

Salvatore Provenzano testified that he had watched the Castellitto murder trial in Ulster County for "quite a few days." He claimed, however, not to know about Anthony Castellitto, Jr.'s testimony that he saw Salvatore Sinno at the Local 560 membership meeting in September of 1961 during which Salvatore Briguglio's appointment as a business agent was announced. Salvatore Provenzano testified as well that he never saw a front page *Star Ledger* article, dated June 2, 1981, which contained admittedly "sensational" facts about Local 560.

Not only have Salvatore Provenzano and the other members of the Local 560 Executive Board members done nothing to devise or implement measures reasonably calculated to prevent and detect potential "labor peace" abuses, they also insist that they believe nothing can be done. This is patently false and

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Any organization can institute internal operating procedures to attempt to weed out corruption and other illegal or improper activity. The record is clear here that no action of this type was ever taken or seriously contemplated.

clearly unconvincing. The common denominator in the Seatrain and City-man cases (as well as in other such schemes) is the use of non-union labor in some aspect of the particular company's operation, a particularly egregious form of betrayal of the membership of the union. A reasonably alert business agent or officer should have no difficulty in learning that the members he represents are not working because the company is using non-union labor. Indeed, Salvatore Provenzano's own testimony suggests that the Local often hears rumors from employees or other employers that a particular employer is "cheating" in some way, and is able to follow up with its own investigation.

Finally, the evidence supports a conclusion that Local 560 will remain a captive labor organization as long as the status quo remains unchanged. The current Executive Board members all profess a belief that the convictions of past officials were unjustified. Sheridan, Sciarra and Jaronko each testified that they would reappoint those very same individuals to positions of trust within Local 560 if circumstances permitted.

III.

In order to prevent future racketeering violations by the Provenzano Group and its aiders and abettors, it is necessary to enjoin Stephen Andretta and Gabriel Briguglio from any future dealings with Local 560 and to remove the current Executive Board members from their positions, appointing in their place one or more trustees to administer the Local during a curative period of appropriate length. Following this period, the trustees would conduct a carefully supervised election to restore union democracy within Local 560.

Stephen Andretta and Gabriel Briguglio, while holding positions of trust within their respective labor organizations, committed serious and protracted labor racketeering violations as associates of the Provenzano Group. If given the opportunity, they are likely to do so again. Stephen Andretta was given an opportunity at trial to make expiation for his conduct, particularly including that involved in the Seatrain Case. Instead, his testimony, which, at best, lacked candor and strained credibility,

demonstrated no hint of atonement. Gabriel Briguglio presented no evidence in his defense, and his silence under the circumstances supports an inference that his own evidence would be unfavorable to his cause.

The current Executive Board members must be removed as a predicate to the restoration of union democracy within Local 560 and to ameliorate and remedy the conditions which have enabled the associates of the Provenzano Group to dominate and exploit the Local for the past thirty years. The evidence clearly points to the fact that the members view the leadership of the Local as a single, monolithic control organization. So long as it, or any portion of it, remains in actual control of Local 560, Professor Summers' testimony indicates that it will be very difficult to remove the sense of fear which the members now experience. This sense of fear within the Local—causing members to believe that it is not safe to protest or organize—is so overwhelming that it is not likely to correct itself in the foreseeable future.

Removal of each Executive Board member is also necessary because each one is either unwilling or unable to evaluate objectively the criminal conduct of fellow officers or business agents, or to institute prophylactic measures to ensure as much as possible that past criminal conduct will not be repeated. Moreover, the pervasive attitude of arrogance and insolence in the face of these circumstances continues to impress upon the membership that the Local's leadership at the very least condones criminal conduct. This, too, serves to perpetuate the atmosphere of intimidation and to suppress any dissent.

Salvatore Provenzano must be removed from office for the following reasons:

> (1) Salvatore Provenzano has been the chief executive officer of Local 560 for most of the period since 1966—a period marked by the Seatrain and City-man schemes, the Woodstock Hotel Conspiracy, the counterfeiting case, and other crimes. Yet he claims to believe that those adjudged to have been guilty of those crimes were in fact innocent, and to believe as well that the members of Local 560 to this day "do not believe the damn verdicts at all."

(2) Salvatore Provenzano has maintained that Anthony Provenzano was "framed" in the Dorn Extortion Case in that the conviction was the result of a vendetta started by Robert Kennedy against Anthony Provenzano and the Presiding Judge allowed himself to be importuned in order to facilitate that vendetta against Local 560.

(3) Salvatore Provenzano has maintained that the conduct which led to Anthony Provenzano's indictment in the Eastern Freightways Case was not criminal in nature, but that Anthony Provenzano simply acted foolishly or stupidly.

(4) Salvatore Provenzano has maintained that his brother Anthony was foolish in using Harold "K.O." Konigsberg Club Cabana as the polling place for the 1962 election, when Anthony Provenzano had earlier evicted Konigsberg from the Local 560 building because the police had described Konigsberg as a "shady character."

(5) Salvatore Provenzano has maintained that the conviction of Anthony Provenzano in the Woodstrock Hotel Case was improperly obtained, and that Anthony Provenzano's conduct in that matter was simply "stupid", not criminal.

(6) Salvatore Provenzano has maintained that Anthony Provenzano's conduct in purchasing the Romano property at 531 Palm Drive was not criminal, just "stupid."

(7) Salvatore Provenzano has maintained that, while he was upset at the prospect of his brother Anthony engaging in a second real estate transaction with Thomas Romano (643 Palm Drive), he did not question his brother about this nor was he "worried about it"—notwithstanding his knowledge that there was an investigation underway of the Romano Loans, that the Romanos were then in default and that Anthony Provenzano then held a position of trust within Local 560.

(8) Salvatore Provenzano has maintained that Ralph Picardo (the main prosecution witness in the Seatrain Case) lied. Specifically, Salvatore Provenzano explains his brother's

conduct in that case by asserting that Anthony had "innocently" accepted the offer (made by Salvatore Briguglio) to pay for his horse farm's expenses. He suggests that Salvatore Briguglio was, in turn, merely "foolish" in allowing Ralph Picardo (a trucking company owner) to actually pay the bills.

(9) Salvatore Provenzano has maintained that he never "had no reason" to talk to Ralph Pellecchia about the allegations in the Seatrain Case after Ralph Pellecchia had pleaded guilty to the related tax charges (before the other defendants went to trial)—notwithstanding the fact that he had known Pellecchia for many years and that such an inquiry might have provided him with valuable insights into the problem of labor racketeering associated with Local 560 or, at the very least, been helpful in understanding his brother Anthony's situation.

(10) Salvatore Provenzano has maintained that the conviction of his brother Anthony in the Castellitto Murder Case resulted not from the fact that he committed the crime, but from the fact that he had brought a Jewish lawyer into Ulster County and the jury did not pay attention to what was said.

(11) Salvatore Provenzano has maintained that the conviction of Nunzio Provenzano and Salvatore Briguglio in the Braun Payoff Demand (1961) was "unjust" and that they were only guilty of "stupidity."

(12) Salvatore Provenzano has maintained that Nunzio Provenzano was "totally innocent" of the charges which led to his conviction in the 1981 City-man Case, and that he was only guilty of stupidity in allowing Cotler to accompany Millington to a meeting.

(13) Salvatore Provenzano has expressed the belief that Salvatore Briguglio was innocent of the 1971 Counterfeiting charges and that he entered a guilty plea as a result of a lot of pressure and the possibility of a long prison term should he have been convicted in a jury trial.

(14) Salvatore Provenzano has admitted that he appointed Salvatore Briguglio to the position of business agent despite convictions in the Braun and Counterfeiting Cases because he did not believe that Salvatore Briguglio was guilty of those crimes, the crimes had nothing to do with Local 560 and he still regarded Salvatore Briguglio as "trustworthy."

(15) Salvatore Provenzano has admitted that, when Salvatore Briguglio resigned as a Trustee of the P&B Fund immediately after the effective date of the ERISA Statute, citing that legislation as his reason, he never questioned Briguglio about the meaning or implications of this statement and he continued to regard Briguglio as a trustworthy person for the position of business agent in the Local.

(16) Salvatore Provenzano has admitted that he never gave "much thought" to the fact that F.B.I. Agents recovered ammunition from Salvatore Briguglio's file cabinet during the search for guns at the union office on December 2, 1975, even though Briguglio was then a twice-convicted felon and had been told at the time of reappointment to "keep his nose clean." Moreover, Salvatore Provenzano admitted that, if he had then begun to think that Briguglio's activities might be causing the union a problem, he kept such thoughts to himself.

(17) As noted previously, early in his testimony, Salvatore Provenzano maintained that, although he had lain awake nights and "thought and thought" about what procedures the union could adopt in order to prevent "labor peace" payoffs, he could not "possibly conceive [of the Executive Board] doing anything to stop it."

(18) Yet, in seeming contradiction to this rather dispositive revelation, Salvatore Provenzano would now have this Court believe that his judgment has matured over the years and that were he confronted today with the question of reappointing a person like Salvatore Briguglio (who had two felony convictions), he would not do its because, even

though he might personally regard the person as trustworthy, he can now foresee the potentiality for problems, and that this would outweigh together considerations in his thinking. This declaration at trial appears to be inconsistent with his earlier stated position that the criminal past of a potential appointee would not deter him from making that person a business agent.

(19) The shallowness of his conviction on this point is demonstrated by the fact that, when pressed on the issue of whether ordinary common sense (not laws or regulations) would or should have prompted him in 1974 to reject Briguglio after the Counterfeiting sentence, Salvatore Provenzano evaded the question and retreated into a diatribe about the innocence of those convicted and the injustice of the convictions.

(20) Similiarly, when pressed to consider in retrospect whether it might not have been prudent in December of 1975 to tell Salvatore Briguglio that his activities were causing the union a problem—in view of the known facts about the reason for and the results of the F.B.I. search—Salvatore Provenzano maintained that it was not Briguglio who had caused the problem, it was Ralph Picardo.

(21) The disingenuousness of Salvatore Provenzano's assertion that "things will be different" is made manifest by his candid admission at trial that he never thought of what he would do if a business agent came to him and reported that an employer had made a Taft-Hartley bribe offer—notwithstanding the fact that such payments were the gravamen of the Dorn, Seatrain and City-man prosecutions.

(22) Contrary to his recent assertions, Salvatore Provenzano has no real interest in establishing the conditions which allow union democracy to emerge within Local 560, or even in learning the facts which might enable him to

do things differently. When confronted with the "sensational" front page *Star Ledger* article, for example, he let slip the fact that he has become "so immune [to such allegations that] it is not even funny."

(23) It is clear that Salvatore Provenzano never lifted a finger to thwart the effort of his brothers while they were arrogantly and corruptly victimizing the union. It is abundantly apparent that "Tony Pro" ran this union for many years with the approbation and connivance of Salvatore. When faced with the choice of protecting the membership or Tony, Sam had no trouble making a decision: his brother came first. This court can have no confidence in his recent change of mind and attitude.

J.W. Dildine must be removed from office for the following reasons:

(1) J.W. Dildine has participated in and bears responsibility for the series of appointments of Local 560 business agents and officers (to fill vacancies) since the mid-1960's which resulted in the current configuration of leadership within Local 560.

(2) J.W. Dildine believes that the union's problems have solely been the result of a vendetta by the Government against the officers of Local 560. Assuming his professed belief to be in earnest, such a belief held in the face of the record of convictions in Local 560 demonstrates a profound lack of objectivity, without which meaningful change within Local 560 will be impossible and fresh racketeering violations by the Provenzano Group and its aiders and abetters will be likely. If his statement of belief is not in earnest, his complicity in the actions of the Provenzano Group is even clearer.

(3) J.W. Dildine is intensely loyal to Anthony and Nunzio Provenzano. He respects them a "great deal" and cannot believe in the validity of their convictions.

(4) J.W. Dildine has endorsed the payments by Local 560 of accrued salary and pension benefits to Anthony Provenzano—notwithstanding the fact that he has twice been convicted of selling out the membership on "bread and butter" issues and that the Local receives no benefit from the expenditure of those assets.

Joseph Sheridan must be removed from office for the following reasons:

(1) Like J.W. Dildine, Joseph Sheridan professes to earnestly believe that Local 560's problems are the product of a government vendetta.

(2) Joseph Sheridan believes that both Anthony and Nunzio Provenzano were convicted of various crimes because of their names.

(3) Joseph Sheridan does not believe in the truth of the allegations which resulted in Nunzio Provenzano's conviction in the Braun case.

(4) Joseph Sheridan is unable or unwilling to institute controls or safeguards to ensure that Local 560 is not victimized in the future by criminal conduct such as that which occurred in the Seatrain and City-man cases.

(5) Joseph Sheridan does not consider Anthony and Nunzio Provenzano to be anything but good labor leaders.

(6) If Nunzio Provenzano were eligible to serve on the Executive Board tomorrow, Joseph Sheridan, as a trustee and Vice-President of Local 560, would welcome him back with "open arms".

(7) Joseph Sheridan's mind-set, after all that has occurred over the past thirty years, would make it impossible for him to formulate and promote policies which would be reasonably calculated to prevent or discourage further racketeering activity within Local 560 and ameliorate the current climate of intimidation. As previously noted, his loyalty has been purchased.

Josephine Provenzano must be removed from office for the following reasons:

(1) At the time of her appointment to the position of Secretary-Treasurer of Local 560, Josephine Provenzano had none of the usual qualifications required of the office, possessing only some limited general bookkeeping skills.

(2) As the defendants admit, Josephine Provenzano's "major qualification" is the fact that she is Anthony Provenzano's daughter.

(3) Josephine Provenzano has yet to assume the duties of a business agent, despite the fact that previous Secretary-Treasurers have assumed such responsibility.

(4) These facts reflect her true status as a mere nominee for her incarcerated father.

(5) In the course of her tenure as Secretary-Treasurer, she has demonstrated none of the independence that would enable her to in any measure counteract the impacted problems of the past and prevent a recurrence of racketeering violations by the Provenzano Group.

Michael Sciarra must be removed from office for the following reasons:

(1) Michael Sciarra does not believe that Anthony Provenzano committed any of the offenses for which he has been convicted.

(2) Michael Sciarra does not believe in the guilt of Nunzio Provenzano in either the Braun or City-man Cases.

(3) Michael Sciarra does not believe that Salvatore Briguglio was guilty of the charges in the Braun Case.

(4) Michael Sciarra has admitted that he could see no reason not to bring Nunzio Provenzano back to the Executive Board, if the government and the law permitted it. He would adhere to this position even if he knew for a fact that

Nunzio Provenzano had committed the crimes of which he has been convicted.

(5) Michael Sciarra has maintained that he cannot think of any controls which could be instituted to prevent future criminal conduct should Nunzio Provenzano return to the union.

(6) Michael Sciarra would welcome back Stephen Andretta even if he knew for a fact that the Seatrain charges against Andretta were true.

(7) Michael Sciarra would "pray" for the return of Anthony Provenzano to Local 560 even if he was convinced that the Castellitto Murder charges were true.

(8) His inactivity as Business Agent to protect the collective bargaining rights of the membership at Canny Trucking was causally related to his close relationship to Frederick Salvatore Furino. This directly contradicts his profession of love for the members of Local 560.

(9) The foregoing demonstrates that Michael Sciarra has an involvement with the Provenzano Group, as well as a mind-set, which makes it impossible for him to analyze objectively what must be done within Local 560 to avoid a repetition of the past and to ameliorate the climate of intimidation within Local 560.

Stanley Jaronko must also be removed from office for the following reasons:

(1) Stanley Jaronko's feelings of loyalty towards the Provenzanos are so intense and his impulse control is so limited that, in the very midst of this lawsuit, he could not restrain himself from striking a Local 560 member who publicly voiced criticism of Salvatore's pronouncements.

(2) Stanley Jaronko has maintained that Anthony Provenzano is not guilty of the murder of Anthony Castellitto.

(3) Stanley Jaronko has admitted that he cannot accept the convictions of Anthony Provenzano and Stephen Andretta in the Seatrain Case.

(4) Stanley Jaronko has admitted that he does not believe in the guilt of Nunzio Provenzano in the City-man or the Braun Cases.

(5) Stanley Jaronko has maintained that it would not be important for him to find out the details surrounding the conviction of a Local 560 officer for having accepted "labor peace" payoffs.

(6) Stanley Jaronko testified that, since neither Nunzio and Anthony Provenzano have ever done anything illegal, it would not be necessary to institute safeguards to insure that, should they return as officials of Local 560, they would not be able to use their positions for criminal purposes.

(7) Stanley Jaronko would take back Nunzio and Anthony Provenzano tomorrow as Local 560 officials, if it were possible.

(8) The foregoing demonstrates that Stanley Jaronko identifies himself closely with the Provenzanos' thirty-year history of racketeering activity within Local 560, and is steadfastly opposed to any change in the status quo.

Thomas Reynolds, Sr. must also be removed from office for the following reasons:

(1) Thomas Reynolds incorrectly believes that Helms Express does not have a special commodities division, and that he has never negotiated with William Bender concerning the operation of a special commodities division within Local 560's jurisdiction.

(2) Thomas Reynolds admits knowing what a guaranteed list is, but insists that he has never negotiated such a list for any of his barns. He specifically had no recollection of having negotiated a guaranteed list for any of his Helms Express Barns. The true facts are to the contrary.

(3) Thomas Reynolds has maintained that none of the barns which he has represented—including Helms and P.I.E.—has ever had a special commodities or iron and steel division. This is totally incorrect.

(4) As the Business Agent for Helms Express and P.I.E., Thomas Reynolds did not question Nunzio Provenzano, Salvatore Provenzano or Michael Sciarra about the allegations contained in the 1980 City-man Indictment, which involved the illegal operation of special commodities divisions by those companies while Reynolds represented their employees. His failure to "see any reason" to do so typifies the studied indifference with which the officials of the Provenzano Regime have regarded the pattern of racketeering activity over the past two decades.

(5) Thomas Reynolds has maintained that the first time he became aware of the fact that salary increases had been voted for and paid to Anthony Provenzano was upon reading the instant Complaint during his deposition on July 7, 1982.

(6) Thomas Reynolds has testified that he was never a Trustee of the Passaic and Bergen Fund, when in fact the records of the Fund reflect that he was a Trustee from September 23, 1975 through May 4, 1977.

(7) All of these facts demonstrate that Thomas Reynolds has little idea of what is going on within Local 560 or what he is supposed to be doing as an official therein. He is simply being "carried" by the Provenzano Regime, and it is inconceivable that he would take any action which might alter the status quo. While his removal for mere inactively or complacency would be inappropriate, in the context of this case his role is clearly that of an aider and abettor, facilitating the actions of the Provenzano Group.

Only through the imposition of a trusteeship for a curative period of sufficient length can the pattern of abuse be broken and future violations prevented. Such a trusteeship would serve to effectively dispel the existing atmosphere of intimidation within

Local 560, to restore union democracy, and to ensure (to the extent possible) that racketeers do not obtain positions of trust within the Local. To do so, I find it necessary to displace the entire Executive Board so that no adherent of the Provenzano Group will be in a position to potentially undermine the efforts of the trustee or trustees. This curative period would then be followed by a supervised general election of new officers for Local 560. This election will be held at such time as the court, with the recommendation of the trustee(s), determines that sufficient political freedom has been restored within Local 560 to permit the membership to express themselves without fear or apprehension. The curative period shall be no longer than necessary to fulfill this purpose, and shall presumptively be eighteen months in accordance with the Taft-Hartley Act.

Because of the unprecedented nature of this action and remedy, I have determined to stay the enforcement of this injunctive relief pending appeal, pursuant to Rule 62 of the Federal Rules of Civil Procedure.

IV.

A.

Before turning to a consideration of the law applicable to this case, I first must resolve several threshold matters. First among these is the question of the burden of proof applicable to this action. Defendants suggest that because of the criminal conduct alleged as constituting some of the predicate acts herein, the appropriate burden is the highly stringent "beyond a reasonable doubt" standard, or alternatively the intermediate standard of "clear and convincing" evidence. The government responds that, given the nature of the relief sought and the fact that this is a civil action, the "preponderance of the evidence" standard should be applied.

The Supreme Court has recently noted that " '[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a

particular type of adjudication.' " *Santosky v. Kramer*, 102 S.Ct. 1388, 1395 (1982), quoting *Addington v. Texas*, 441 U.S. 418 (1979) and *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., concurring). In any given proceeding, the standard of proof applied "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 102 S.Ct. at 1395.

At one end of the spectrum of the three burdens of proof established by the Court's opinions in this area in the "preponderance of the evidence" standard. This is the standard applied in the typical civil case, which usually involves private parties seeking money damages. Society has the least concern with the accuracy of the outcome of such private suits, and the litigants share the risk of error in roughly equal fashion. *Addington*, 441 U.S. at 423.

At the other end of the spectrum, in a criminal case, the interests of the defendant are of such magnitude that they "have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.* (footnote omitted). As a consequence, society imposes almost the entire risk of error on itself in such cases.

In the middle ground is the intermediate standard, usually known as the "clear and convincing evidence" standard. It is generally used in civil actions involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant, as well as in civil actions initiated by the government that "threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.' " *Santosky*, 102 S.Ct. at 1396, quoting *Addington*, 441 U.S. at 425, 426. *See, e.g. Santosky* (parental rights termination proceeding); *Addington* (civil commitment); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schoneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization).

Applying these distinctions to the case before me, I find that the "preponderance of the evidence" standard is the appropriate burden of proof to be applied herein. First, the defendants in this action do not face criminal sanctions, and thus there appears

to be no basis on which to apply the "beyond a reasonable doubt" standard. Next, the defendants also do not face the risk of a significant deprivation of liberty or stigma as defined by the Supreme Court. While the complaint does allege fraudulent acts and other criminal and quasi-criminal conduct on the part of certain of the defendants, these allegations are only in the context of the RICO statute's requirement that, even in civil RICO actions, the plaintiff plead and prove the existence of a pattern of racketeering activity.

Further, I find that the nature of the relief sought provides an additional key to the burden of proof issue. The relief sought by the government in this action—that which is authorized by §1964 (a)—is equitable and remedial in nature, not punitive. In these circumstances, I find it appropriate to follow the clear majority of the courts which have considered this issue in applying the "preponderance of the evidence" standard. *See, e.g., United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Farmers Bank of Delaware v. Bell Mortgage Corp.*, 452 F.Supp. 1278, 1280 (D.Del. 1978); *United States vs. Winstead*, 421 F.Supp. 295, 296 (N.D.Ill. 1976); *Heinold Commodities, Inc. v. McCarty*, 513 F.Supp. 311, 313 (N.D.Ill. 1979); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F.Supp. 673, 676 (N.D.Ind. 1978); *Parnes v. Heinold Commodities, Inc.*, 487 F.Supp. 645, 647 (N.D.Ill. 1980).

Next, I find that the deposition of Andrew Reynolds is admissible under Rule 801(d) (2) (D) and (E) of the Federal Rules of Evidence. I find further that for these purposes Reynolds was both an agent of Local 560 and a co-conspirator of the Provenzano Group defendants herein. Andrew Reynolds, while a business agent of Local 560, was generally empowered to exercise independent judgment and discretion concerning the contractual affairs of Local 560. He acted free of close supervision concerning these matters. While not authorized to carry out certain functions reserved to the officers of Local 560, such as the formal signing of contracts, it is uncontested that business agents can and do negotiate contracts, organize unorganized jobs and handle grievances on behalf of the members they represent. I

thus find that Andrew Reynolds was, during his tenure as Business Agent, a managing agent within the meaning of Fed. R. Civ. P. 32(a) (2). *See Krauss v. Erie R.Co.*, 16 F.R.D. 126, 127 (S.D.N.Y. 1954).

Finally, I find that I need not reach the issue of the admissibility of the results of the Galagarza lie detector test. I have, on other grounds, found that Galagarza's testimony at trial was not sufficiently credible to permit a finding (by even a fair preponderance of the evidence) that Thomas Reynolds committed the murder of Walter Glockner.

IV.

B.

There have been numerous legislative attempts to control labor racketeering at both the state and federal levels. Federally, these have included the LMRDA, 29 U.S.C. § 411, the Hobbs Act, 18 U.S.C. § 1951, *see, e.g., United States v. Palmiotti*, 254 F.2d 491 (2d Cir. 1958), the Taft-Hartley Act, 29 U.S.C. § 186, and various other statutory enactments, such as 29 U.S.C. § 501(c) (prohibiting embezzlement from labor organizations) and 18 U.S.C. § 664 (prohibiting embezzlement from employee benefit plans).

A major stumbling block in prosecutions under each of these statutes has been the difficulty in demonstrating the nature and specific elements of the alleged illegal activity in the context of ongoing syndicated or organized crime. *See* Blakey and Goldstock, 'On the Waterfront': RICO and Labor Racketeering, 17 Am. Crim. L. Rev.341, 367–47 (1980). As they have noted:

> Labor racketeering is not a single crime; it includes the infiltration, domination, and use of a union for personal benefit, generally by members of various organized criminal groups. Labor racketeering thus comprises both traditional overt physical crime and more sophisticated covert white-collar offenses. The challenge of law enforcement has been to demonstrate that relationship—the invidious nature of

> white-collar crime when committed by a criminal group as an element of a pattern of racketeering activity.

Id. (footnotes omitted). It was in the context of these difficulties of proof that Congress passed the RICO Act.

The Racketeer Influenced and Corrupt Organization Act was enacted primarily, although not exclusively, to halt organized crime's incursion into legitimate organizations. *See id.* at 348 (1980). As the statute itself states, its purpose was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. Pub. L. No. 91–452, 84 Stat. 922, 923 (1970).

The effect of RICO is not to make illegal any specific substantive act which was previously legal, since each act punishable under RICO also constitutes a separate offense under state or federal law. Instead, RICO states that if a person commits two or more of these offences within a ten-year period he or she is guilty of a "pattern of racketeering activity," 18 U.S.C. § 1961 (1) and (5), and is therefore subject to additional penalties. RICO requires more, however, and that is proof of a relationship between the "pattern of racketeering activity" and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). Specifically, 18 U.S.C. § 1962 (b) requires that the government establish that the defendant "person" acquired or maintained, through a pattern of racketeering activity, an interest in or control of such an enterprise. Section 1962(c) in turn makes it a federal crime for any person employed by or associated with any enterprise to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity. "Enterprise," according to the statute, "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associates in fact although not a legal entity." 18 U.S.C. § 1961(4).

The Supreme Court has recently held that a completely illegal organization may be an enterprise for RICO purposes.

United States v. Turkette, 452 U.S. 576 (1981); *see also United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983), *United States v. Provenzano*, 620 F.2d 985, 992–93 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980). The *Turkette* Court reasoned that it was not inconsistent with RICO's purpose to give effect to the plain language of the statute to punish the activities of illegal organizations—even before any infiltration of legitimate organizations took place. This "preventative" function would, the Court stated, enable federal law enforcement officials "to deal with the problem at its very source." 452 U.S. at 591, 593.

To avoid the dangers potentially associated with such a broad reading of the statute, the *Turkette* Court added three elements necessary to establish the existence of such an enterprise: "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit." 452 U.S. at 583. The enterprise must additionally be shown to have an existence "separate and apart" from the pattern of activity in which it engages. *Id.*, *see United States v. Riccobene*, 709 F.2d 214, 221 (3d Cir. 1983). The Court noted that the proof used to establish the existence of an enterprise "may in particular cases coalesce" with that used to establish the existence of a pattern of racketeering activity, although "proof of one does not necessarily establish the other." 452 U.S. at 583.

RICO additionally requires the showing of "person" as a separate element apart from the "enterprise." While nothing in the statute compels the conclusion that these elements are mutually exclusive, there is also nothing on its face to support the opposite conclusion. *See* Blakey, "The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*," 58 Notre Dame L. Rev. 237, 286–87 (1982). Given Congress' characterization of RICO as "remedial" and its directive that it be "liberally construed," I conclude that the resolution of this issue should depend on the circumstances of each case. In the case before me, I find no incongruity or inconsistency with the statute in the government's characterization of the Provenzano Group (and its associates) as a "person" in some instances, particularly as to § 1962(b), while also characterizing it as an "enterprise" in others, particularly as to § 1962(c). *But see Bennett v. Berg*, 685 F.2d

1053, 1061 (8th Cir. 1982); *Van Schaick v. Church of Scientology*, 535 F.Supp. 1125 (D.Mass. 1982). There is, of course, no question that individuals may be charged under RICO as "persons" while being grouped collectively as an "enterprise", under the well-established association in fact doctrine. *E.g., United States v. Turkette*, 452 U.S. 576 (1981).

Section 1962(d) makes it an offense to conspire to violate sections 1962(b) or (c). The Third Circuit has recently held that to establish such an "enterprise" conspiracy, the government must establish both that an enterprise did in fact exist and that the individual defendants knowingly agreed to participate in the "enterprise" through a pattern of racketeering. *United States v. Riccobene*, 709 F.2d 214, 220—21 (3d Cir. 1983). As Judge Adams stated in *Riccobene:*

> An agreement merely to commit the predicate offenses would not be sufficient to support a RICO conspiracy. Nor is it sufficient if the defendants merely participate in the same enterprise. . . . This is so because, under RICO, it is an agreement 'to conduct or participate. . .in the conduct of [an] enterprise's activities' through the commission of predicate offenses that is prohibited, not an agreement to commit a pattern of racketeering activity alone.

Id. at 224. Thus it is clear that RICO has more broadly defined the allowable purpose or objective of a conspiratorial agreement under § 1962 (d). Conspiracy may be established even where the underlying offenses are apparently unrelated, as long as the defendants have agreed to, for example, participate in the furtherance of an enterprise's affairs by committing those underlying offenses. *Id.*

The circuits have split on the extent and nature of the agreement required under RICO. For example, in *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2965 (1982), the court stated that "[p]roof of a RICO conspiracy charge requires that the Government prove the additional element of agreement. The defendant must have 'objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more

predicate crimes.' " *Id.* at 1012, quoting *United States v. Elliot*, 571 F.2d 880, 903 (5th Cir.) *cert. denied*, 439 U.S. 953 (1978). The *Elliott* court's observation, quoted by Judge Johnson in *Phillips*, is, however, less than clear. Does it, for example, mean that the individual must personally commit two or more offense, that he agree personally to commit two or more offenses, or that he agree that someone connected to the enterprise commit two or more offenses? *See United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981). *See also United States v. Lemm*, 680 F. 2d 1139, 1203 n.11 (8th Cir. 1982). The First Circuit, in *Winter*, joined the Fifth Circuit[25] in requiring proof of an agreement to commit two acts personally by the defendants. The Ninth Circuit, however, in *United States v. Brooklier*, 685 F.2d 1208, 1220-23 (9th Cir. 1982) has termed the two personal offense rule an "unnecessary burden." Most recently, the Eleventh Circuit has rejected the two personal offense rule, stating that "[i]t is enough that the defendant agreed to the commission of two predicate acts." *United States v. carter*, No. 82-8053, slip op. at 1169 (11th cir. January 13, 1984) (emphasis added). *But see United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982).

The Third Circuit has not had to squarely face and resolve the issue of the necessity of proof of the commission of two predicate acts personally. *See, e.g., United States v. Dickens*, 695 F.2d 765, 780-81 (3d Cir. 1983) (two offense rule noted, but conviction upheld without clear proof of personal participation of one defendant); *United States v. Boffa*, 688 F.2d 919, 934, 937 (3d Cir. 1982) (more than two offenses shown; two offense instruction upheld, but not required). *Riccobene* is not, in my judgment, to the contrary. *United States v. Riccobene*, 707 F.2d 214, 224, 227 (3rd Cir. 1983). Commentators have recently criticized the "two personal offense" rule. After tracing the development of the rule from an evidentiary rule of thumb to a rule of law, one commentator has noted that it is "impossible to

25. *See, e.g., United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1451 (1982); *United States v. Welsh*, 656 F.2d 1039, 1057 (5th Cir. 1981). *But see United States v. Cauble*, 706 F.1d 1322, 1339 (5th Cir. 1984) (agreement to either commit or aid and abet in the commission of the predicate acts sufficient).

square it with general principals of accomplice or conspiratorial responsibility." "Most importantly," he suggested, ". . . it is perverse" in its inhibitory effect on the prosecution of the leaders of organized crime groups. Blakey, "The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*," 58 Notre Dame L. Rev. 237, 297 (1982). Specifically, under such a reading of the statute, organized crime leaders could avoid conviction under RICO by "keeping their hands clean." *See also* Note, "Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law," 58 Notre Dame L. Rev. 587, 602-05 (1983).

I conclude that the cases dealing with the two personal offense rule involve a confusion between a shorthand statement of what is necessary to violate RICO substantively as a principal in the first degree (two personal offenses), and what may be sufficient to violate RICO substantively as a principal in the second degree or as an accessory before the fact under 18 U.S.C. § 2 (aiding and abetting another to commit two offenses). *See* W. La Fave and A. Scott, *Criminal Law* § 63, p. 495 (1972). *See also United States v. Freeze*, 707 F.2d 132, 136-37 (5th Cir. 1983). At common law, too, one who was a co-conspirator, as an independent basis for criminal responsibility, was vicariously and substantively liable for reasonably foreseeable offenses committed in furtherance of the conspiracy. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 647 (1946) ("[t]he overt act of one partner in crime is attributable to all."). *See also, Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 197-98 (1st Cir. 1972) (conspirator "may be held [civilly] responsible for the acts of a co-conspirator . . . even if she herself did not participate in those acts."). I, therefore, conclude that a RICO "Enterprise" conspiracy may be established without personal conduct amounting to two personal predicate offenses. Instead, it is sufficient if the government demonstrates the agreement through the defendant's aiding and abetting in at least two such offenses, or through assent to the commission by someone else or several others of at least two such offenses. *See Bannon v. United States*, 156 U.S. 464, 468-69 (1895) ("To require an overt act to be proven against every member of a conspiracy, or a distinct act connecting him with the combination to be alleged, would not

only be an innovation upon established principle but would render most prosecutions for the offense nugatory.").

Whether an "overt act" other than a predicate act of racketeering need be proven to establish a violation of § 1962(d) has also occasioned conflicting decisions among the Circuits. The old Fifth Circuit held this to be an element of a RICO Enterprise conspiracy. *See United States v. Sutherland*, 656 F.2d 1181, 1186 n.4 (5th Cir. 1981), *rehearing denied*, 663 F.2d 101 (5th Cir. 1982). The Second Circuit in *United States v. Barton*, 648 F.2d 224, 237 (2d Cir.) *cert. denied*, 102 s.Ct. 307 (1981), found no such showing to be required. Given that the statute itself contains no overt act requirement,[26] I must conclude that the Second Circuit's position is the better reasoned. *See United States v. Forsythe*, 429 F. Supp. 715 (W.D.Pa.), *reversed on other grounds*, 560 F.2d 1127 (3rd Cir. 1977).

Next, whether some state of mind (such as intent or knowledge) must be demonstrated in a RICO Enterprise conspiracy beyond that required for the commission of the predicate offenses has further split the courts that have considered the issue. The Second and Ninth Circuits have held that no such showing is required under § 1962(d). *United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Boylon*, 620 F.2d 359, 361-62 (2d Cir. 1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980). "[G]rave doubts as to the propriety of these holdings" were, however, expressed by the Eighth Circuit in *United States v. Bledsoe*, 674 F.2d 647, 661 (8th Cir. 1982). The old Fifth Circuit required proof of a state of mind for the RICO-specific elements, not just the predicate offenses. *See, e.g., United States v. Sutherland*, 656 F.2d 1181, 1191-95 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1451 (1982); *United States v. Diecidue*, 603 F.2d 535, 553-55 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). I conclude that proof of a state of mind apart from that required for the commission of the predicate offenses

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26. S. Rep. 91-617, 91sdt Cong. 1st Sess. 159 (1969) cites *Singer v. United States*, 323 U.S. 338, 340 (1945), which stands for the proposition that where no overt act requirement is set forth in the statute, none is required.

must be demonstrated for each alleged conspirator. *But see United States v. Boffa*, 513 F.Supp. 444 (D.Del. 1980), *aff'd in part, rev'd in part*, 688 F.2d 919 (3rd Cir. 1982).

Finally, as to aiding and abetting, the conduct requirement under 18 U.S.C. § 2 is complicity with or facilitation of the criminal conduct of another.[27] In order to convict a defendant of aiding and abetting the commission of a crime, the government must prove two essential elements: (1) that the substantive crime has been committed, and (2) that the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with intent to facilitate it. *United States v. Dixon*, 658 F.2d 181 (3rd Cir. 1981); *see also United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981). The knowledge and volitional act requirements of Dixon's second element have different meanings in various contexts. Here, where the Local's officials were under an affirmative duty to act on behalf of the membership, a defendant's deliberate refusal either to act or to investigate (*i.e.*, the conscious avoidance of knowledge) — while knowing the consequences of such inaction — can satisfy this element, so long as that defendant had some interest in the successful accomplishment of the crime being committed. *See Moss v. Morgan Stanley, Inc.*, 553 F.Supp. 1347 (S.D.N.Y. 1983). These elements of aiding and abetting may, of course, be proved by circumstantial as well as direct evidence. *United States v. Smith* 700 F.2d 627 (11th Cir. 1983).

The kinds of conduct which can constitute aiding and abetting are many and varied. Former Chief Judge Hastie, in *United States v. Barber*, 429 F.2d 1394, 1397 n.4 (3rd Cir. 1970), listed several which have applicability to this case:

> . .[T]he fact that an individual has served as a lookout during the commission of a crime is a clear indication of participation in the wrongdoing. *Long v. United States*, (D.C. Cir.), 360 F.2d 829. Verbal encouragement of an assault has been held sufficient evidence of complicity in the wrongdoing.

27. I note that while this is a civil RICO action, the substantive theory which is applicable is nonetheless criminal — both as to aiding and abetting and as to conspiracy.

Kuney v. Dutcher, 1885, 56 Mich. 308, 22 N.W. 866. Those who make no assault but undertake to intimidate the victim and block his escape are criminally associated with a robbery. *Williams v. United States*, D.C. App. 1963, 190 A.2d 269. Flight from the scene of the crime with the actual perpetrators has been said to justify the same inference. *Corbin v. United States*, D. C. App. 1968, 237 A. 2d 466. Even remaining with a group after disclosure of the intention of members of the group to commit a crime has been held to be sufficient evidence of association with the criminal venture. *People v. Hill*, 1968, 39 Ill. 2d 125, 233 N.E. 2d 367.

Each of the following constitute an act of racketeering activity within the meaning of Section 1961(1) of Title 18 of the United States Code:

(a) The Castellitto murder, committed on June 6, 1961, by Anthony Provenzano, Salvatore Briguglio, Harold "K.O." Konig erg and Salvatore Sinno in violation of the laws of the State of New York.

(b) The Middlesex County Loansharking Transaction committed during March of 1967 by Thomas Andretta and Armand Faugno in violation of New Jersey law (extortion).

(c) The Skil Tool Theft, committed during 1968 by Thomas Andretta and Frederick Salvatore Furino in violation of 18 U.S.C. § 659.

(d) The counterfeiting committed during 1971 by Salvatore Briguglio, Thomas Andretta, Armand Faugno and three others in violation of 18 U.S.C. § 472.

(e) The Seatrain "Labor Peace" Payoffs, committed between 1969 and 1977 by Anthony Provenzano, Stephen Andretta, Thomas Andretta and Gabriel Briguglio in repeated violation of 18 U.S.C. § 186.

(f) The City-man "Labor Peace" Payoffs, committed between 1971 and 1980 by Nunzio Provenzano and Irving Cotler in repeated violation of 18 U.S.C. § 186.

(g) Receipt of kickbacks by Anthony Provenzano, aided and abetted by Salvatore Briguglio and Stephen Andretta, in connection with the Romano loans between 1974 and 1977, in violation of 18 U.S.C. § 1954.

(h) Continuously between approximately 1961 and the present, Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta, Salvatore Briguglio, aided and abetted by defendant officers and business and business agent of Local 560, unlawfully affected commerce and the movement of articles and commodities in commerce by extorting certain intangible property rights—rights to union democracy under § 401 of the LMRDA—from the membership of Local 560, in repeated violation of 18 U.S.C. § 1951.

(i) Union members enjoy the federally protected right to participate in the affairs of their labor organization in a democratic fashion. Fundamental to the democratic process is the right to voice publicly one's opposition to and criticism of the policies, decisions, proposals and activities of the incumbents, the right to run for union office and the right to promote the candidacy of others against the incumbents. The ability to exercise such rights free from unreasonable interference constitutes property within the meaning of 18 U.S.C. Section 1951. *United States v. Local 560*, 550 F.Supp. 511 (D.N.J. 1982).

(ii) The wrongful use of actual or threatened force or violence or of fear of economic or physical harm in order to cause the membership of a labor organization to surrender such federally protected rights constitutes extortion within the meaning of 18 U.S.C. § 1951(b)(2). *United States v. Sweeney*, 262 F.2d 272 (3d Cir. 1959), *United States v. Kenny*, 462 F.2d 1205 (3d Cir.) *cert denied*, 409 U.S. 914 (1972); *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 380

U.S. 915 (1965) (fear of wrongfully threatened economic loss also satisfies Hobbs Act); *Carbo v. United States*, 314 F.2d 718, 740 (9th Cir.), *cert. denied*, 377 U.S. 953 (1964) (knowledge or belief that defendants were "underworld" men or "strongarm" men sufficient); *United States v. DeMasi*, 445 F.2d 251, 257 (2d Cir. 1971); *United States v. Stubbs*, 476 F.2d 626 (6th Cir. 1973) (reputation for violence sufficient); *United States v. Billingsley*, 474 F.2d 63, 66-67 (6th Cir. 1973) (general bad reputation sufficient).

(iii) The climate of intimidation—which has been generated within Local 560 as a result of the Castellitto murder and the allegations regarding the Glockner murder, the many other criminal acts attributed to the Provenzano Group (as detailed in section II B of this opinion), the repeated appointment of convicted criminals and persons reputed to be involved in criminal activity to positions of trust within the Local, and their persistent refusal to remove such persons from positions of trust and to prevent known criminals from frequenting the union offices or to take any other steps to ensure union democracy—has created a justifiable perception and resulting fear among a substantial portion of the membership of Local 560 that such a wrongful use of actual and threatened force and violence and of disastrous and irreparable economic harm are likely to result from any public or visible demonstration of opposition to or criticism of the policies, proposals, decisions or activities of the incumbents of the Provenzano Regime.

(iv) The use of such extortion against the membership of Local 560 does affect commerce and the movement of articles and commodities in such commerce. *United States v. Provenzano*, 688 F.2d 194 (3d Cir. 1982); *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980). (Local 560 party to contracts with companies engaged in interstate shipment of commodities).

These acts of racketering constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

Since the late 1940's Anthony Provenzano has been the leader of a group of individuals who have been associated together in fact as an illicit enterprise within the meaning of 18 U.S.C. § 1961(4). This group of individuals, the Provenzano Group, is presently composed of Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta, Gabriel Briguglio and Andrew Reynolds, and has in the past included among its associates Salvatore Briguglio (until his murder in 1968), Salvatore Sinno (until his defection in 1961), Harold "K.O." Koningsberg (until his incarceration in the mid-1960's), Armand Faugno (until his "disappearance" in 1972), Ralph Michael Picardo (until his defection in 1973), Ralph Pellecchia (until his incarceration), and Frederick Salvatore Furino (until his murder in 1982). The Provenzano Group Enterprise did affect interstate commerce. *See United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980).

Continously between approximately 1950 and the present, the aforesaid defendants, as individuals associated with the Provenzano Group Enterprise, unlawfully conducted and participated, directly or indirectly, in the conduct of that Enterprise through a pattern of racketeering activity, in continuing violation of Sections 1962(c) and 2 of Title 18 of lthe United States Code. The individual associates' culpability under § 1962(c) has been established by their own acts of racketeering, by their aiding and abetting the conduct of other associates, and, under *Pinkerton*, by the conduct of their co-conspirators.

Throughout this period, the defendant associates of the Provenzano Group Enterprise understood the scope of the Enterprise and had knowledge that other associates were performing tasks related to the criminal operation of the Group as such. Each had a knowing dependence upon the others for his own profit and position. The defendant associates knowingly and intentionally agreed to further the Provenzano Group Enterprise through the commission of various racketeering offenses. *See United States v. Riccobene*, 709 F.2d 214, 225 (3rd Cir. 1983). Therefore, I conclude that the defendant associates of the Group

conspired to violated 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d). This consipracy continues to this day. *See United States v. Armocida*, 515 F.2d 29, 47 (3d Cir. 1975); *United States v. Cappetto*, 505 F.2d 1351, 1358 (7th Cir. 1974).

Local 560 and its benefit funds and severance pay plan also constitute an enterprise — the Local 560 Enterprise — within the meaning of 18 U.S.C. § 1961(4), the activities of which affect interstate commerce. Continuously between approximately 1961 and the present, defendants Anthony Provenzano, Nunzio Provenzano, Salvatore Briguglio, Stephen Andretta, Thomas Andretta, Andrew Reynolds and perhaps others unlawfully acquired and maintained, directly and indirectly, an interest in and control of the Local 560 Enterprise through a pattern of racketeering activity, in continuing violation of Sections 1962(b) and 2 of Title 18 of the United States Code. As with the § 1962(c) violation, the culpability of the individual associates of the Provenzano Group under § 1962(b), as well as their aiders and abettors, has been established by their own conduct, by their aiding and abetting the acts of racketeering of others, and, under *Pinkerton*, by the racketeering acts of their co-conspirators.

Throughout this period, these defendants knowingly and intentionally agreed to acquire and maintain, both directly and indirectly, an interest in and control of the Local 560 Enterprise through the commission of various racketeering offenses. Each of these defendants understood the scope of this agreement and had knowledge that others were performing tasks related to the accomplishment of their purpose. Therefore, I conclude that these defendants also unlawfully conspired to violate 18 U.S.C. § 1962 (b), in violation of 18 U.S.C. § 1962(d). *See United States v. Riccobene*, 709 F.2d 214, 225 (3d Cir. 1983). This conspiracy also continues to this day. *FSee United States v. Armocida*, 515 F.2d 29, 47 (3d Cir. 1975); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974).

Further, during their respective periods of incumbency, defendants Salvatore Provenzano, J. W. Dildine, Michael Sciarra, Stanley Jaronko, Joseph Sheridan, Josephine Provenzano and Thomas Reynolds, Sr., did aid, abet and facilitate the commission of the § 1962(b) violations. This complicity

was exhibited through their appointment and retention in office of certain officials of Local 560 and in their discharge of certain other duties, the collective impact of which has, in particular, directly and substantially contributed to the existence of the climate of intimidation within the Local.

The officers of a labor organization occupy positions of trust in relation to that organization. As such, it is their duty to, among other things, hold the money and property of the labor organization on behalf of its members. *See* 29 U.S. § 501(a). Such officers should adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their labor organization. *See Local 107 v. Cohen*, 182 F. Supp. 608 (E.D. Pa. 1969), *affirmed*, 284 F.2d 164 (3d Cir. 1960). Additionally, the officers have an affirmative duty and responsibility to ensure to the extent possible that the persons whom they appoint and retain in any position of trust within the labor union will adhere to the same high standards of responsibility and ethical con .uct in administering the affairs of the union. In making such appointments, the incumbent union officers have an affirmative duty to insure that they obtain the true facts with respect to the character of the potential appointee and his or her discharge of the obligations of the position. An unreasonable failure to learn the true facts as to such appointments exposes these incumbent officials to liability for such conduct. *See United States v. Andrealis*, 366 F.2d 423, 430 (2d Cir. 1966); *Francis v. United Jersey Bank*, 87 N.J. 15, 31 (1981). Similarly, in making such appointments, the incumbent officers have an affirmative duty to evaluate, to the greatest extent possible, the impact which any particular appointment might reasonably be expected to have on the membership in light of existing circumstances. *See Lamonte v. Mott*, 93 N.J. Eq. 229, 236-37 (Err. & App. 1921).

Therefore, given the circumstances present within Local 560 during their respective periods of incumbency, the following conduct of the defendant officers of Local 560 was highly improper and constitutes gross misconduct:

(a) the repeated appointment of numerous individuals who had substantial criminal records (often involving crimes of

violence or labor racketeering offenses) without any offsetting basis to believe that the individual would abstain from criminal conduct and meet the standards for ethical and appropriate conduct in administering the labor organization.

(b) the refusal to take any action to remove those appointees whose conduct, once in office, was clearly improper—particularly the refusal to take such action in the face of compelling circumstances such as formal allegations or proof of renewed criminal conduct, or a subsequent criminal conviction for a crime involving a direct breach of trust to the membership.

(c) the expenditure of Local 560 assets for the benefit of Anthony Provenzano who has three times committed offenses while in office, each of which constituted a direct and serious breach of trust towards the Local's membership.

(d) the reckless indifference to the persistent and systematic misconduct of fellow incumbent officers with respect to, (1) a pattern of, at best, unsuitable appointments, (2) a pattern of access to the union's offices by known or reputed criminals, and (3) a pattern of non-beneficial expenditures of Local 560 assets.

Both as gross misconduct and independently thereof, this conduct constitutes aiding and abetting of the violations of 18 U.S.C. § 1962(b). This conduct has facilitated the acquisition and maintenance, both directly and indirectly, of control of Local 560 by the Provenzano Group, most strikingly in the appointment of Group associates to officer positions, but also in contributing to the climate of fear and intimidation within the union and otherwise assisting the Provenzano Group to achieve its objectives.

The Provenzano Group, which in essence is a carefully structured and well disciplined conspiracy, has been in substantially continuous existence throughout the past thirty years, and is likely to continue. The very conditions within Local 560 which have enabled and encouraged the Provenzano Group to gain and maintain control over it and to exploit it as an instrumentality for the systematic and repeated commission of labor racketeering

offenses continue in place today. Unless these conditions are changed, there is a substantial likelihood that the racketeering violations which have victimized both the membership and the affected portions of the trucking industry will recur. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). *See also Local 167 v. United States*, 291 U.S. 293, 298 (1934).

Continuously throughout approximately the last quarter of a century, the associates of the Provenzano Group have dominated Local 560 through fear and intimidation, extorting the membership's union democracy rights, and have exploited it through fraud and corruption. Because the conditions with Local 560 which have been the *sine qua non* for the repeated commission of acts of racketeering by these defendant, I must conclude that future violations of 18 U.S.C. § 1962(b), (c) and (d) are likely to occur, thereby resulting in irreparable harm to the membership of Local 560, its contract employers, and the public. *See Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1180 (3d Cir. 1976); *Securities and Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). In order to prevent and restrain such future violations of § 1962, it is necessary to enjoin defendants Stephen Andretta and Gabriel Briguglio from any future contacts with Local 560, and to remove the current members of the Local 560 Executive Board in favor of the imposition of a trusteeship for an appropriate period of time, which will terminate following the completion of supervised elelctions.

I have additionally determined to exculpate the institutional defendants herein, specifically Local 560 itself and its Funds and Plan. In order to attribute the misconduct of the individual defendants to these institutional defendants, I must find (1) that the individual defendants committed the acts of racketeering in the scope of their employment, and (2) that they thereby intended to advance the affairs of the institutional defendants. *See New York Central Railway v. United States*, 212 U.S. 481, 493-99 (1909). While it is clear that the individual defendants acted within the scope of their employment in committing the various criminal acts previously recited, it is equally obvious that their intent was

not to advance the affairs of their employers. To the contrary, the institutional defendants in this action were the victims. The associates of the Provenzano Group, added and abetted by the other defendants herein, intended by their actions to control and exploit Local 560 to its detriment. I therefore conclude that there is no basis for retaining either Local 560, the Funds or the Plan as a defendant in this action, except insofar as it is necessary to retain Local 560 as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future.

VI.

In sum, I have determined that the individual defendants herein have violated 18 U.S.C. § 1962(b) (c) and (d). Because of the likelihood of continued violations, I have determined to enjoin defendants Stephen Andretta and Gabriel Briguglio from any future contacts of any kind with Local 560, and to remove the current members of the Local 560 Executive Board in favor of a trusteeship. This trusteeship shall continue for such time as is necessary to foster the conditions under which reasonably free supervised elections can be held, presumptively for eighteen months.[28] I have, however, decided to stay the effect of this injunctive relief pending appeal, and have also decided to defer the naming of the trustee(s) until the completion of any such appellate proceedings. Finally, I have decided to dismiss Local 560, the Funds and the Plan from this action, except insofar as I must maintain jurisdiction over Local 560 as a nominal defendant in order to effectuate the equitable relief heretofore specified or as may be ordered in the future.

Plaintiff shall submit an order in conformance with this opinion within seven (7) days.

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28. Because the membership of Local 560 has been victimized, it would be anomolous to fail to recognize that in addition to accomplishing the previously stated remedial objectives, it is crucial to ensure that economic benefits presently secured by various collective bargaining agreements, be protected and legitimately enhanced *in futuro*. I need not enlarge upon this theme at this time.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Civil No. 82-689 (HAA)
v.	:	
LOCAL 560, *ET AL.*	:	JUDGMENT ORDER

This matter having come on trial to the Court upon Verified Complaint, Amended Complaint, Answers and proofs, and the cause having been argued by Plaintiff United States of America, W. Hunt Dumont, United States Attorney for the District of New Jersey (by Robert C. Stewart, Attorney-in-Charge, Thomas L. Weisenbeck, Assistant United States Attorney, and Leopold Laufer, Special Attorney), defendants Local 560 and Severance Pay Plan, by Edward A. Cohen, Esq., Schneider, Cohen, Solomon & DiMarzio, Esqs., defendant Local 560 Executive Board Members, by Harvey Weissbard, Esq., defendant Trucking Employees of North Jersey Welfare Fund, by Herbert New, Esq., Brenner, New & Brenner, Esqs., Stephen Andretta, *pro se* and Gabriel Briguglio, *pro se*, it is on this 16th day of March 1984

ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That the defendant Local 560 Executive Board Members—namely Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J. W. Dildine, Thomas Reynolds, Sr., Michael Sciarra and Stanley Jaronko — together with Stephen Andretta and Gabriel Briguglio, have violated Title 18, United States Code, Sections 1962(b), (c) and (d);

2. That future violations of Title 18, United States Code, Sections 1962(b), (c) and (d) by these defendants and others are likely to occur, thereby resulting in irreparable harm to the membership of Local 560, its contract employers and the public;

3. That, in order to prevent and restrain such future violations of Title 18, United States Code, Sections 1962(b), (c) and

(d), the defendant Local 560 Executive Board Members — namely Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J. W. Dildine, Thomas Reynolds, Sr., Michael Sciarra and Stanley Jaronko — be and are hereby removed from office throughout the period of trusteeship specified below;

4. That a trusteeship shall replace the current members of the Local 560 Executive Board for such time as is necessary to foster conditions under which reasonably free, supervised elections can be held, presumptively for eighteen months;

5. That, in order to prevent and restrain such future violations of Title 18, United States Code, Sections 1962(b), (c) and (d), the defendants Stephen Andretta and Gabriel Briguglio be and are hereby enjoined and prohibited from any future contacts and dealings, direct or indirect, of any kind whatsoever with Local 560 and any officer or employee thereof, or any other labor organization or employee benefit plan, as defined in Title 29, United States Code, about any matter which relates directly or indirectly to the business affairs of the Local 560 Enterprise or other such labor organizations or employee benefit plans;

6. That the Trucking Employees of North Jersey Welfare Fund and the Severance Pay Plan are dismissed from this action; and

7. That the effect of the injunctive relief ordered herein, together with the naming of the trustee(s), is stayed pending appeal.

HON. HAROLD A. ACKERMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5333

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,
SALVATORE PROVENZANO, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J.W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC. SALVATORE PROVENZANO, Employee Trustee,
THOMAS REYNOLDS, SR., Employee Trustee
LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN,
SALVATORE PROVENZANO, Trustee and Administrator,
JOSEPHINE P. SEPTEMBRE, Trustee and Administrator
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually,

Salvatore Provenzano, Joseph Sheridan, Jay Dildine, Josephine Provenzano, Thomas Reynolds, Michael Sciarra and Stanley Jaronko,

Appellants

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5334

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, SALVATORE PROVENZANO, President
JOSEPH SHERIDAN, Vice-President
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J.W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC. SALVATORE PROVENZANO, Employee Trustee, THOMAS REYNOLDS, SR., Employee Trustee

LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN,
SALVATORE PROVENZANO, Trustee and Administrator,
JOSEPHINE P. SEPTEMBRE, Trustee and Administrator,
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually

LOCAL UNION NO. 560,
Appellants

On Appeal from the District Court
for the District of New Jersey
D.C. Civil No. 82-0689

Argued February 12. 1985

BEFORE: GARTH and BECKER. *Circuit Judges.*
and ROSENN. *Senior Circuit Judge*

(Opinion filed December 26. 1985)

OPINION OF THE COURT

GARTH. *CIRCUIT JUDGE:*

This appeal culminates a lengthy and complex civil action brought pursuant to the Racketeer Influenced and Corrupt Organizations ("RICO") Act. 18 U.S.C. §§ 1961. *ET SEQ.*. BY THE United States against several defendants who allegedly acquired an interest in. and effectively dominated. Local 560 of the International Brotherhood of Teamsters ("Local 560"). The district court. concluding that Local 560 was a "captive labor organization." enjoined certain defendants from any future contacts with Local 560. and removed the current members of the Local 560 Executive Board. replacing the Executive Board with a temporary trusteeship until free elections could be held. The district court's opinion appears at 581 F. Supp. 279 (D.N.J. 1984). The district court stayed its injunction pending appeal to this Court. We now affirm.

I.

On March 9, 1982, the government filed its civil complaint naming as defendants twelve individuals, Local 560, and Local 560's Welfare Fund and Severance Pay Plan. The government alleged that five of the named defendants: Anthony Provenzano, Nunzio Provenzano, Steven Andretta, Thomas Andretta and Gabriel Briguglio, were members of an ongoing criminal confederation - the Provenzano Group[1] - which, through acts of extortion and murder, effectively acquired an interest in, and control of, Local 560, an enterprise within the meaning of RICO, in violation of 18 U.S.C. § 1962(b).[2] The government also charged these defendants, as the Provenzano Group, with unlawfully participating, directly and indirectly, in the conduct of Local 560's affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)[3] and with conspiring to violate the above two

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1. Although not named as defendants by the government, the district court held that other past and present members of the Provenzano Group included Harold Konigsberg, Armand Faugno, Frederick Furino, Salvatore Sinno, Ralph Picardo, and Andrew Reynolds. App. at 62.

2. 18 U.S.C. § 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

3. 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

provisions of RICO (§§ 1962(b) and (c))in contravention of 18 U.S.C. § 1962(d).[4]

Finally, the government charged the remaining seven individual defendants: Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J.W. Dildine, Thomas Reynolds, Michael Sciarra, and Stanley Jaronko, who, at the time the suit was brought, constituted the Executive Board of Local 560, with aiding and abetting the Provenzano Group in violating 18 U.S.C. § 1962(b) and (d).[5]

As stated above, the government avers that the Provenzano Group, aided and abetted by past and present members of the Executive Board of Local 560, violated 18 U.S.C. § 1962(b) by acquiring an interest in and control of Local 560 through a pattern of racketeering activity. The Provenzano Group's racketeering activity, the government argues, consisted of various acts of murder and extortion, the extortion element consisting of:

> the wrongful use of actual and threatened force, violence and fear of physical and economic injury in order to create within Local 560 a climate of intimidation which induced the members thereof to consent to the surrender of certain valuable property in the form of their union rights as guaranteed by the provisions of Sections 157 and 411 of Title 29 of the United States Code [the Taft-Hartley Act, 29 U.S.C. § 157 and the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411].

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4. 18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection[s] (a), (b) or (c) of this section.

5. 18 U.S.C. § 2 provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

App. at 174A. Specifically, paragraph 12(a) of the Complaint alleged that The Provenzano Group extorted the membership's rights to vote, speak, and assemble freely by systematic acts of intimidation, including, as the district court summarized:

> (1) the June 1961 murder of Anthony Castellitto; (2) the August 1961 appointment of Salvatore Provenzano to the position of Trustee formerly occupied by Castellitto; (3) the September 1961 appointment of Salvatore Briguglio -- the alleged murderer of Castellitto -- to the position of Business Agent; (4) the February 1963 appointment of Nunzio Provenzano to the position of Business Agent following his January 1963 conviction for extortion; (5) the May 1963 murder of Walter Glockner; (6) the 1964 appointment of Robert A. Luizzi to the position of Business Agent in spite of a record of criminal convictions; (7) the May 1967 appointment of Luizzi to the position of Trustee; (8) the February 1969 appointment of Salvatore Briguglio to position of Business Agent following completion of a term of imprisonment for extortion; (9) the April 1969 appointment of Nunzio Provenzano to the position of clerk following completion of a term of imprisonment for extortion; (10) the 1970 appointment of Nunzio Provenzano to the position of Business Agent; (11) the 1971 appointment of Thomas Reynolds, Sr. to the position of Business Agent in spite of a record of criminal activity; (12) the 1972 appointment of Nunzio Provenzano to the position of Fund Trustee; (13) the 1972 appointment of Salvatore Briguglio to the position of Fund Trustee; (14) the allowance of frequent visitations by Armand Faugno and Thomas Andretta to the offices of Local 560; (15) the January 1963 appointment of

Nunzio Provenzano to the position of Secretary-Treasurer: (16) the 1973 appointment of Reynolds to the position of Fund Trustee: (17) the 1974 resumption of duties as Business Agent by Salvatore Briguglio following completion of a term of imprisonment for counterfeiting: (18) the 1974 appointment of Luizzi to the position of Fund Trustee: (19) the November 1975 appointments of Anthony and Nunzio Provenzano to the positions of Secretary-Treasurer and President, respectively, in spite of a record of convictions for extortion: (20) the February 1977 appointment of Reynolds to the position of Trustee: (21) the July 1978 appointment of Josephine Provenzano to the position of Secretary-Treasurer following Anthony Provenzano's conviction for the Castellitto murder: (22) the July 1981 appointment of Salvatore Provenzano to the position of President following Nunzio Provenzano's forced resignation as a condition of bail on a labor racketeering conviction: (23) the Executive Board's failure to recover monies wrongfully converted by Anthony Provenzano: (24) the retention of Marvin Zalk as Fund Administrator in spite of payments accepted by him from an insurance company representative during the 1950's: (25) the retention of Ralph Torraco as the Fund's independent certified public accountant in spite of his federal indictment for systematically overbilling the Fund: (26) the extortion of contributions to the defense funds of the Provenzanos and Michael Sciarra from union members: (27) the 1981 appointment of Luizzi to the position of Business Agent: and (28) associations by some of the defendants with Frank "Funzi" Tieri and Matteo Alfredo Ianniello, reputed to be organized crime members.

App. at 10-12.

In addition to committing acts of murder and extortion for the purpose of dominating Local 560, the individual members of the Provenzano Group, according to the government's complaint, allegedly committed several other illegal acts in its participation in the conduct of the affairs of the Local 560 enterprise in violation of 18 U.S.C. § 1962(c). The predicate illegal acts which comprised the Provenzano Group's "pattern of racketeering activity" under § 1962(c) as alleged in the government's Complaint were summarized by the district court as follows:

> (1) the extortion of $17,000 from Walter Dorn and his company (Dorn Transport, Inc. of Rensselaer, New York), in return for "labor peace"; (2) the wrongful conversion by defendant Anthony Provenzano, aided and abetted by successive defendant members of the Local 560 Executive Board, of approximately $223,785 in Local 560 funds "by means of false and fraudulent pretenses, representations, and promises, and pursuant to a scheme and artifice to defraud . . . ;" (3) the wrongful receipt by Provenzano Group members of payments, loans and other things of value from certain employers (Interocean Services, Inc. and Di-Jub Leasing, Inc.) in exchange for "labor peace"; (4) the unlawful receipt by defendant Anthony Provenzano, aided and abetted by Salvatore Briguglio, of certain fees, kickbacks, gifts or things of value in the form of certain Florida real estate because of, and with intent to be influenced with respect to, his actions and decisions relating to the Benefit Fund; and (5) the wrongful receipt by defendant Nunzio Provenzano, together with Irving Cotler and others, as associates of the Provenzano Group, of "labor peace" payments by certain employers, specifically Pacific Intermountain Express Company, Mason

and Dixon Lines, Inc., T.I.M.E. - DC, Inc. and Helms Express.

App. at 13.

In its demand for relief, the government sought only injunctive and equitable remedies. The government asked that the district court (1) enjoin Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta, and Gabriel Briguglio (the members of the Provenzano Group) from having any dealings, directly or indirectly, with any officer or employee of the Local 560 enterprise or any other labor organization or employee benefit plan; (2) enjoin Salvatore Provenzano, Joseph Sheridan, Josephine Provenzano, J.W. Dildine, Thomas Reynolds, Sr., Michael Sciarra, and Stanley Jaronko (the members of the Executive Board) from acting in any official capacity for or on behalf of Local 560 or its funds; (3) appoint one or more trustees to discharge all duties and responsibilities of the Executive Board of Local 560 until such time as free elections can be held; and (4) after the membership participation in a free election, permanently enjoin all individual defendants from having any future dealings of any nature whatsoever, directly or indirectly, with any officer, agent, representative, or employee of Local 560 or any other labor organization.

Before trial, the government entered into consent orders with defendants Anthony Provenzano, Nunzio Provenzano, and Thomas Andretta. The consent orders bar these three defendants from, among other things, (1) associating with any enterprise (within the meaning of 18 U.S.C. § 1961) which seeks to dominate, control, or otherwise influence the affairs of any labor organization or any employee benefit plan and (2) acting as an officer, organizer, administrator, or representative for any labor organization or any

employee benefit plan. In exchange, the government agreed to "not pursue any further civil claims against the defendant[s] based upon the transactions which are specifically enumerated in the Verified Complaint . . . ." App. at 164A. Accordingly, pursuant to these consent orders, Anthony Provenzano, Nunzio Provenzano, and Thomas Andretta were removed as defendants prior to trial.

On November 1, 1982, prior to trial, the district court denied Local 560's 12(b)(6) motion to dismiss paragraph 12(a) of the government's complaint for failure to state a cause of action. *United States v. Local 560*, 550 F. Supp. 511 (D.N.J. 1982). Paragraph 12(a), as previously noted, charged the Provenzano Group and the Executive Board with extorting members' rights to vote, speak, and assemble. The district court held that the extortion of intangible rights guaranteed to union members by the LMRDA's Bill of Rights, 29 U.S.C. § 411, constituted a violation of the Hobbs Act, 18 U.S.C. § 1951, and thus, would properly serve as a predicate act under RICO. The district court also rejected Local 560's argument that the LMRDA remedies are the exclusive remedies available in combatting the extortion of member's rights under that statute.

On January 25, 1983, the bench trial of this cause commenced. The trial lasted until May 17, 1983, comprising 51 days of testimony. On March 16, 1984, the district court entered its final order, granting the government's requested injunctive relief in all respects. At the same time, the district court withheld the appointment of a trustee because it stayed its order pending appeal. *See* Fed. R. Civ. P. 62. All of the defendants except alleged Provenzano Group members Stephen Andretta and Gabriel Briguglio filed timely notices of appeal.

II.

The district court's analysis of the defendants' RICO Act violations in the instant case differed from the analysis on which the government's Complaint was based. The government's complaint referred to Local 560 as the "enterprise" for both its section 1962(b) and (c) counts. Thus, the government alleged in its complaint that the individual associates of the Provenzano Group violated 18 U.S.C. § 1962(c) by participating in the conduct of the affairs of the *Local 560 enterprise* through a pattern of racketeering activity. Although the district court made findings consonant with this theory, it also held that the individual members of the Provenzano Group violated 18 U.S.C. § 1962(c) by unlawfully participating in the conduct of the affairs of the *Provenzano Group* (not Local 560), which the district court held was the "enterprise" for purposes of 18 U.S.C. § 1962(c).

In addition, although the government initially alleged separate and distinct predicate criminal offenses under sections 1962(b) and 1962(c), the district court held that there were several predicate offenses committed by the Provenzano Group members which served as the underlying predicate acts for both the section 1962(b) and section 1962(c) counts. Specifically, the district court, while attributing other predicate acts to either 1962(b) or 1962(c), *see, e.g.*, n.6, *infra*, held that the following crimes, among others, constituted predicate acts under *both* of the above subsections of the RICO Act:

> (1) *Dorn:* Between approximately January 1, 1952 and June 1, 1959, Anthony Provenzano (leader of the Provenzano Group), while an official of Local 560, extorted payoffs from Walter Dorn and his company, Dorn Transport, Inc., in exchange for "labor peace." Anthony Provenzano was subsequently convicted on one count of Hobbs

Act extortion under 18 U.S.C. § 1957 for his part in the Dorn labor peace payoffs. App. at 24, 69.

(2) *Castellitto:* In 1961, Anthony Provenzano recruited Harold Konigsberg and Salvatore Briguglio to kill Anthony Castellitto, who was a popular member of Local 560 and who posed a threat to Anthony Provenzano's control of the union. On June 6, 1961, Konigsberg, Briguglio, Salvatore Sinno, and others, committed the murder. Salvatore Briguglio was killed while under indictment for the Castellitto murder, and on June 21, 1978, Anthony Provenzano was sentenced to life imprisonment for his part in the murder of Castellitto. App. at 24-25, 30, 70-71.

(3) *Braun:* Between November 30, 1961 and December 12, 1961, Nunzio Provenzano and Salvatore Briguglio attempted to extort labor peace payments (the Braun Payoff Demand case) from the Braun Company in violation of New York Penal Law § 560 and § 1294 (Conspiracy and attempted grand larceny). Nunzio Provenzano and Salvatore Briguglio were convicted and incarcerated for approximately 2-1/2 years in New York. App. at 25-26, 29, 69.

(4) *Seatrain:* Between December of 1969 and June of 1977, Antohny Provenzano, Stephen Andretta, Thomas Andretta, and Gabriel Briguglio unlawfully received "labor peace" payoffs from Interocean Services, Inc. and Di-Jub Leasing Inc. (Seatrain Labor Peace Payoffs) in violation of 18 U.S.C. § 186(b). Anthony Provenzano and Thomas Andretta each received 20 years imprisonment for their part in the Seatrain payoffs, and Stephen Andretta and Gabriel Briguglio received 10 and 7 years imprisonment, respectively. App. at 22-23, 25, 28, 77.

(5) *Romano:* Between 1974 and 1977, Anthony Provenzano, aided and abetted by Salvatore Briguglio and Stephen Andretta, received kickbacks in connection with loans made by the union's Passaic and Bergen Funds to Thomas and Frank Romano in violation of 18 U.S.C. § 1954. App. at 77-82.

(6) *City-Man:* Between January of 1971 and July of 1980, Nunzio Provenzano, Irving Cotler, and other individuals unlawfully received labor peace payoffs (the City-Man payoffs) from Pacific Intermountain Express Company, Mason and Dixon Lines, Inc. T.I.M.E. - DC, Inc., and Helms Express in violation of 28 U.S.C. § 186(b). On May 5, 1981, Nunzio Provenzano was convicted on RICO charges stemming from these City-Man labor peace payoffs and was sentenced to 10 years imprisonment. App. at 26, 82-83.

Although the district court concluded that the crimes recounted above constituted predicate acts for purposes of both sections 1962(b) and 1962(c), the district court also held that the Provenzano Group's extortion of the LMRDA rights of union members -- which was the only predicate act aided and abetted by the Local 560 Executive Board defendants -- was a predicate act only for purposes of section 1962(b).[6]

The district court held that the extortion of the membership's democratic rights in violation of the Hobbs Act, 18 U.S.C. § 1951, was accomplished by fostering a general climate of intimidation within Local 560. The district court stated that the failure to develop

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6. Since the Provenzano Group, aided and abetted by the Executive Board, extorted LMRDA rights of Local 560's membership for the purpose of "acquiring an interest in and control of" the Local 560 enterprise, the extortion of membership rights was properly designated as a section 1962(b) act.

any political opposition to the leadership of Local 560 during the past 20 years demonstrated this climate of intimidation. The district court identified several discrete actions taken by the Provenzano Group and the Executive Board of Local 560 which helped nurture this climate of intimidation, and which resulted in numerous instances of extortion.

The actions taken by the Provenzano Group and the Executive Board, as found by the district court, included (1) the repeated appointments of convicted criminals and persons reputed to be involved in criminal activity to positions of trust and responsibility within Local 560; (2) the expenditure of Local 560 assets in the form of increased salary and pension benefits to Anthony Provenzano, who has committed three criminal offenses while a member of Local 560's Executive Board; (3) permitting the presence of convicted criminals and reputed criminals in the offices of Local 560; and (4) the failure of the Executive Board to counter perceptions on the part of Local 560's membership that it was unwise for the members to voice dissatisfaction with Executive Board policy.

III.

We address first the issue which concerns both the Provenzano Group defendants and the Executive Board defendants: namely, whether the district court properly found a violation of section 1962(b) of the RICO Act. The district court held that the Provenzano

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The district court held, as well, that certain crimes committed by the Provenzano Group were predicate acts only for purposes of section 1962(c). For example, the district court noted that the Middlesex County Loansharking Transaction committed in March of 1967 by Thomas Andretta and Armand Faugno in violation of New Jersey law and the Skil Tool Theft committed in 1968 by Thomas Andretta and Frederick Salvatore Furino in violation of 18 U.S.C. § 659, were racketeering activities relevant only to section 1962(c) of the RICO Act. App. at 76.

Group members, aided and abetted by the Executive Board, acquired an interest in and control of Local 560 through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(b) n.2 supra.

Central to the district court's section 1962(b) analysis is its finding that the Provenzano Group and the Executive Board extorted the membership's LMRDA rights to democratic participation in their union's affairs. LMRDA rights apply to every member of a labor organization. These rights include the right to nominate Union leaders; to vote in union elections; to meet and assemble freely with other members; and to express any views, arguments, or opinions at union meetings. 29 U.S.C. § 411(a)(1) & (2) provides:

> (a)(1) Equal rights. -- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
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> (2) Freedom of speech and assembly. -- Every member of any labor organizations shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed

> to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Indeed, it is upon these predicate acts of extortion that the district court based its finding of liability.

A.

(1)

As a threshold matter, there are certain evidentiary questions which this court must resolve that bear upon the extortion of LMRDA rights. At trial, the government, in attempting to prove that the Provenzano Group and the Executive Board of Local 560 extorted the LMRDA rights of union members, submitted various proofs to establish that many union members were fearful of exercising their statutory right to participate in the affairs of Local 560. As part of these proofs, the government sought to admit into evidence numerous newspaper and magazine articles,[7] spanning a twenty-year period, which reported the criminal activities of Provenzano Group members. The government argued that these articles were relevant and admissible, not to demonstrate the truth of the statements in the articles, but to demonstrate the perceived reputation of Provenzano Group members in the community.

The government further maintained that it was proper for the district court to infer that these articles

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7. These articles were from the New York *Daily News*, the *Hudson Dispatch*, *Life* Magazine, the Newark *Evening News*, the *New York Post*, the *New York Times*, The Bergen *Record*, the Newark *Star Ledger*, the *Wall Street Journal*, and *Time* Magazine.

were read by Local 560's membership and that the reputation of the Provenzano Group members intimidated the membership into surrendering their LMRDA rights. The district court, adopting the government's position, admitted the newspaper and magazine articles into evidence,[8] holding that "it may be a fair inference that the members kept abreast of certain events and that having read these articles they feared violence or economic retaliation if they exercised their LMRDA rights." App. at 1400.

The defendants argue that the district court improperly admitted these newspaper accounts into evidence for reputational purposes. Specifically, the defendants maintain that the government did not establish a sufficient foundation to allow in this evidence: namely, that the government did not introduce evidence, along with these articles, to indicate that members of Local 560 actually read the articles in question, and as a result of reading the articles, had developed a fear of the leadership of Local 560.

The district court, in admitting the evidence, relied principally on *Webb v. Fuller Brush Co.*, 378 F.2d 500 (3d Cir. 1967). In *Webb*, the plaintiffs brought a products liability tort suit for injuries sustained from using a facial hormone cream sold to the plaintiffs by the defendant. At trial, the plaintiffs sought to introduce articles discussing the dangers of certain hormones. The trial court disallowed the evidence. This Court reversed, holding that, since the

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8. The district court did not admit into evidence all of the articles submitted by the government. The district court, for example, disallowed articles that did not contain specific references to Local 560 or Provenzano Group members, and also excluded articles from Philadelphia papers on the basis that there was an insufficient number of Local 560 members who lived within the general circulation area of those papers.

defendant had a duty to warn of the dangers of the face cream if it knew *or should have known* that the product could be injurious, the articles were admissible for the purpose of proving whether the defendant should have alerted the plaintiffs to possible hazards. Although, in *Webb*, this court did not discuss the foundation necessary for the introduction of the articles, presumably, the plaintiffs there demonstrated that the articles were in a publication that the defendant, at the very least, *should* have been reading.[9]

In the instant case, unlike in *Webb*, in order for the articles to be admitted into evidence it must have been demonstrated, not that the members of Local 560 *should* have read the articles in question, but that members of Local 560 *actually* read these articles. The government at trial, however, did not develop this necessary foundation. Indeed, only one Local 560 member testified that he had ever read anything in the papers about the Provenzano Group and Local 560. August Muller, a Local 560 member who had been assaulted by Executive Board member Stanley Jaronko, stated that "[i]n the papers it said that there was an argument involved the prior night, and the man [Glockner] was dead the next morning . . . I don't want anything to happen to me . . . ." App. at 7668. We hold that this isolated reference to a single newspaper article afforded an insufficient foundation for the admission into evidence of several articles covering a period of twenty years.

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9. The government also argues that United States v. Blane, 375 F.2d 249 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967) supports the district court's decision to admit the articles into evidence. However, we note that in *Blane*, the newspaper articles were not submitted into evidence, and were used only to cross-examine reputational witnesses.

(2)

Another evidentiary question involving the extortion of membership rights concerned the testimony of Raymond Wren. Wren, a Special Agent of the Department of Labor, testified at trial as to the reputation for violence and economic retribution of several former and current members of the Executive Board of Local 560. Wren based his testimony on interviews he had with 15 former and current members of Local 560. The defendants argue that the district court abused its discretion in admitting Wren's testimony because Wren did not base his testimony on a random sample of the Local 560 members, but rather interviewed only members whom he knew to be opponents of the Provenzano Group and the current Executive Board of Local 560. The government, on the other hand, argues that the validity of Wren's "sample" goes only to the weight of his testimony, and not to its admissibility.

We recognize that, in modern, complex litigation, investigative and research surveys may be properly admitted into evidence for a variety of purposes. Indeed, in *United States v. 88 Cases, etc.*, 187 F.2d 967 (3rd Cir.), *cert. denied*, 342 U.S. 861 (1951), this Court held that a scientific survey of 3539 individuals was admissible as evidence. We concluded that the survey was not hearsay because it was used, not to prove the truthfulness of the numerous responses, but rather to prove the reaction of the general public. We further held that "[t]he technical adequacy of the surveys was a matter of the weight to be attached to them." *Id* at 974.

Here, however, we have a different situation. Contrasted with the random sampling of individuals in *88 cases*, in this case, no attempt was made to establish a scientific basis for the selection of

individuals interviewed. Indeed, Wren, himself, admitted that his "survey" did not comport with accepted survey techniques. App. at 663.

In the instant case, Wren's testimony was introduced to prove the reputation of past and present members of the Executive Board as perceived by the membership of Local 560. However, as we have noted, Wren did not engage in a scientific, random survey of Local 560's membership. Instead, as Wren conceded at trial, he approached only those past and present members of Local 560 whom he knew to be hostile to the leadership of Local 560.[10] Such an approach, by its very nature, is suspect because of its biased and selective character. Wren's one-sided sampling did no more than represent the opinion of a few, known opponents of the Local 560 membership. Although the membership in general may have subscribed to the same opinions as those expressed by Wren's 15 interviewees, Wren's survey technique was not designed to, nor did it, record the impressions of the membership at large. *See Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978) ("A proper universe must be examined and a *representative* sample must be chosen" for a survey to be trustworthy.) (emphasis in original).

While, in normal course, a research survey conducted in accordance with accepted standards of sampling may be admitted into evidence to be then tested for its weight, where a survey is offered that has met no such standards and, indeed, where that survey is conceded to have been deliberately partisan in its

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10. Wren obtained these names of members or former members of Local 560 mainly from the Department of Labor personnel who had been involved in the investigation of the Local 560 1962 election, and in supervising the 1965 election. All the individuals selected for interviews by Wren had been political opponents of the Provenzano Ticket in the 1960's.

limited sampling, the prejudicial effect of such a flawed survey substantially outweighs any probative value it may have. *See* Fed. R. Evid. 403. In such an instance, admissibility must be denied and weight cannot be attributed to testimony of this nature. Because Wren's testimony was predicated on such a flawed survey, we conclude that the district court abused its discretion in admitting Wren's testimony into evidence.[11]

Thus far, we have held that the district court abused its discretion by admitting into evidence: (1) the newspaper and magazine articles and (2) Wren's testimony. Both of these evidentiary submissions were offered to prove that the rank and file of Local 560 was fearful of their union leadership. The government's contention is that, by establishing a climate of fear within Local 560, the Provenzano Group and the Executive Board of Local 560 were able to extort the membership's LMRDA rights in violation of the Hobbs Act, 18 U.S.C. § 1951.

(3)

The question remains, however, whether the admission of this evidence by the district court was fatal to the government's charges, or whether the district court, in erring, committed error which was harmless. As this court held in *DeLaval Turbine, Inc. v. West India Industries, Inc.*, 502 F.2d 259, 263-64

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11. The government relies on language which appears in United States v. Lewin, 467 F.2d 1132, 1140 (7th Cir. 1972) for the proposition that "[s]ystematic inquiry by a person coming from outside will often be a better source of knowledge than the casual opportunities of a neighbor or a friend." (quoting III Wigmore, Evidence § 692 at 22 (Chadbourn rev. 1970). However, the text in Wigmore, although not quoted in *Lewin*, continues: "the only reason for distrust exists when the inquirer . . . seeks evidence of one purport only." In the instant case, Wren sought evidence of only one purport.

(3d Cir. 1974), "[i]t is well settled that in a non-jury case, an appellate court will not reverse on the basis of an erroneous admission of evidence unless (1) there is insufficient evidence other than the challenged evidence to support the district court's conclusion, or (2) the district court is induced by the challenged evidence to make an essential finding that it would not have made otherwise." Accordingly, in the instant case, we must determine whether there exists sufficient evidence in the record (apart from the newspaper and magazine articles and Wren's testimony) to support the district court's conclusion that the rights of Local 560's rank and file were extorted.

It was on the basis of several sources that the district court concluded that the Provenzano Group and the Executive Board extorted the LMRDA rights of a substantial segment of Local 560's membership. Of these sources, one of the most prominent was the testimony of Professor Clyde Summers.

Professor Summers, who has specialized in labor law since 1943, testifed as an expert witness for the government. According to Professor Summers, a significant proportion of Local 560's rank and file were induced by fear of the Provenzano Group to surrender their membership rights. Summers' conclusion that the membership did not feel free to criticize openly the policies and practices of the Local 560 leadership (and, thus, were fearful of exercising their union democratic rights) was based primarily on the observation that, throughout the history of Local 560, incidents which should have raised criticism of Local 560's leadership among its membership, did not. Among the incidents which Summers' believed should have spurred membership reaction were: the murder of Walter Glockner the morning after his public display of opposition at a union meeting; the many convictions of

union officials on union-related offenses: the failure of the Executive Board to take any action when an official was indicted: the appointment and reappointment of persons who had been convicted of union related offenses: the payment of salary increases to Anthony Provenzano: the appointment of Anthony's daughter, Josephine Provenzano, to the office of Secretary-Treasurer of the union following Anthony's incarceration: and the proposal to pay Anthony Provenzano a one-half salary pension despite his conviction for the murder of Anthony Castellitto. As Professor Summers testified, "[I]t is beyond belief that 10,000 members would sit by and watch these things done and never utter a peep", unless a substantial number of the membership were fearful for their lives or their jobs. App. at 1608.

The district court accepted Summers' testimony as convincing, and we agree. There seems to be no other plausible explanation for the silence of Local 560's membership in the face of repeated outrageous events. The district court, placing an emphasis on Summers' testimony, found that the silence was due to the repressive atmosphere of Local 560, an atmosphere created and maintained by the Provenzano Group and the Executive Board. We cannot characterize such a finding as clearly erroneous.

In addition to the testimony of Professor Summers, the district court, in determining that the membership's rights had been extorted, also relied on the testimony of August Muller. Muller, an employee of Maislin Brothers Trucking Company and a member of Local 560, testified at trial that, at a general membership meeting in 1983, he heard Salvatore Provenzano state that Maislin would soon be out of business because the International Brotherhood of Teamsters would insist that Maislin repay certain monies which Teamster employees had loaned the

company. After hearing Salvatore Provenzano's warning, Muller testified that Local 560 Business Agent Stanley Jaronko went to the Maislin terminal to hold a meeting and speak to the drivers. At this meeting, Muller challenged Jaronko about the statements Salvatore Provenzano had made earlier at the general membership's meeting. The exchange between Muller and Jaronko became increasingly heated, and Jaronko ultimately struck Muller, sending him into a wall. It was after this altercation that Muller recalled the shooting death of Walter Glockner, which occurred the morning after Glockner had voiced opposition to Local 560's leadership at a general meeting.

At trial, Muller was called to testify about the incident. The district court observed that: "Throughout his direct and cross-examination, Muller's demeanor evinced the precise attributes of a man in the *grip of extreme fear or even sheer terror* because of what he was being compelled to say publicly." App. at 89 (emphasis added). Professor Summers' testimony indicated that Muller's feelings and fears were shared by a large percentage of Muller's compatriots. App. at 1608. As the district court noted, Muller's testimony dramatically illustrated the climate of fear within Local 560 and served to support and reinforce Professor Summers' conclusion that the membership's LMRDA rights to democratic participation in Local 560 were extorted through intimidation and fear.

Accordingly, we believe that the district court was not clearly erroneous in finding that the Provenzano Group and the Executive Board had extorted the LMRDA rights of a substantial number of Local 560 members. This finding, predicated on Professor Summers' and Muller's testimony, does not depend on the evidence erroneously admitted, namely the

newspaper articles and Wren's survey. Hence, under the *DeLaval, supra*, standard, even though the district court may have erred in admitting these two categories of evidence, that error was harmless and the district court's finding, based on evidence independent of the challenged evidence, must be sustained. *See also Anderson v. City of Bessemer*, ___ U.S. ___, 105 S. Ct. 1504 (1985).

B.

The district court not only found by a preponderance of the evidence[12] that the Provenzano Group and the Executive Board extorted the membership's LMRDA rights, but also concluded that

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12. We agree with the district court that the appropriate burden of proof for the government in a civil action under the RICO Act (where remedies are sought pursuant to 18 U.S.C. § 1964) is the "preponderance of the evidence" standard and not, as the defendants contend, the "beyond a reasonable doubt" or "clear and convincing evidence" standard. App. at 124-27. In holding that "preponderance" was the proper standard, the district court utilized the three-part balancing test articulated in Santosky v. Kramer, 455 U.S. 745, 754 (1982).

The *Kramer* Court, in determining whether a particular standard of proof in a particular proceeding satisfies due process, evaluated three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the state's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure. In the instant case, the district court chose the "preponderance" standard in the instant case because (1) the defendants faced neither the prospect of criminal sanction nor the imposition of significant liberty deprivations and (2) the nature of the relief sought was equitable and remedial in nature, not punitive. In adopting the "preponderance" standard, the district court joined the majority of courts which have addressed this issue. *See e.g.* United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978); Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311, 313 (N.D. Ill. 1979).

Subsequent to the filing of the district court's opinion, the Supreme Court decided two cases which bear directly on this issue and which add further support for adopting the "preponderance" standard in civil actions brought under the RICO Act. In Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), the Supreme Court held that the normal civil standard of proof applies in civil fraud actions brought under section 10(b) of the Securities and Exchance Act of 1934, 15 U.S.C. § 78j(b). The language in *Huddleston* mandates the "preponderance" standard in all but a few civil cases. The *Huddleston* Court, in surveying this area of the law, stated:

> Thus, we have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, *supra* (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276, (285-286) (1966) (deportation). By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence. *See, e.g., United States v. Regan*, 232 U.S. 37, 48-49 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution). Thus, in interpreting a statutory provision in *Steadman v. SEC*, *supra*, we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the antifraud provisions. The sanctions imposed in the proceedings included an order permanently barring an individual from practicing his profession. And in *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. at 355, we held that a preponderance of the evidence suffices to establish fraud under § 17(a) of the 1933 Act.

Id. at 389-90.

Even more on point is the Supreme Court's decision in Sedima v. Imrex Co., Inc. ___ U.S. ___, 105 S. Ct. 3275 (1985), where the Court held that proof of racketeering-type activity was not required to establish a RICO predicate act. Although the Court in *Sedima* did not reach the burden of proof issue, it nevertheless held:

> We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(C). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable

such extortions constituted predicate acts for purposes of section 1962(b) of the RICO Act. 18 U.S.C. 1962(b).[13] *United States v. Local 560*, 550 F. Supp. 511 (D.N.J. 1982). Section 1962(b) makes it unlawful for any person to maintain an interest in, or control of, any enterprise through a pattern of "racketeering activity." Section 1961(1) of the RICO Act, in relevant part, defines "racketeering activity" as "any act which is indictable under . . . section 1951 [of title 18: the Hobbs Act] (relating to interference with commerce, robbery, or extortion) . . . . " Thus, in the instant case, the question is whether the extortion of the membership's LMRDA rights constitutes a Hobbs Act violation so as to satisfy the predicate act requirement of section 1962(b) of the RICO Act.

> doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principle here. That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction.

105 S. Ct. at 3282-83 (citations omitted).

Reviewing the Supreme Court opinions in *Santosky*, *Huddleston*, and *Sedima*, we are satisfied that the preponderance standard applies in civil RICO litigation. While we recogize that the defendants in such actions have significant interests at stake (i.e., financial, occupational, and reputational), these interests are not sufficiently compelling to trigger a more stringent burden of proof.

13. The defendants argue that the Attorney General's jurisdiction under RICO in the instant case is pre-empted by sections 481-483 of the LMRDA, 29 U.S.C. § 481-483. They maintain that, since the district court inferentially found that Local 560's elections since 1968 have been illegal, the Attorney General could not pursue a RICO claim because the LMRDA, 29 U.S.C. §§ 481-483, provides the exclusive remedy by which an election can be set aside.

The Hobbs Act, 18 U.S.C. § 1951,[14] prohibits the obstruction or interference with commerce by use of threats or extortion. This court has held that the primary elements of a Hobbs Act violation are that (1) that the defendants induce their victims to part with property; (2) that the defendants do so through the use of fear; and (3) that, in so doing, the defendants adversely affect interstate commerce.[15] *United States v. Addonizio*, 451 F.2d 49, 59 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

This argument has little merit. Contrary to the defendants' contention, the government initiated this suit, not to invalidate any particular election, but to eliminate entirely the union's racketeering element. The RICO Act and sections 481 through 483 of the LMRDA were designed to combat entirely different offenses, and as such, the LMRDA cannot be pre-emptive. Moreover, we note that RICO was enacted in 1970, eleven years after the LMRDA, and was intended, in part, to supplement the protections already afforded union members.

14. 18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any erson or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

15. In United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), this Court held that, to satisfy the "affect on interstate commerce" requirement, all that need be shown is "proof of a reasonably probable effect on commerce, however minimal, as [a] result of the extortion." The defendants argue that there was no evidence that the extortion of union members' intangible property rights (LMRDA rights) had any affect on interstate commerce. We disagree.

(1)

The defendants initially argue that the membership's LMRDA rights are intangible property rights, and as such, cannot be the basis for a claim of extortion under the Hobbs Act. Defendants maintain that only the extortion of tangible property (i.e. physical items or possessions) can be cognizable as a Hobbs Act violation.

However, the language of the Hobbs Act makes no such distinction between tangible and intangible property. Section 1951(b)(2) broadly defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force . . . ." Moreover, other circuits which have considered this question are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property. *See United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (right to solicit business accounts); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973) (right to solicit business accounts); *United States v. Tropiano*,

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Put simply, the actions of Local 560 affected interstate commerce because Local 560 entered into collective bargaining agreements with businesses directly engaged in interstate commerce. Thus, when membership rights to democratic participation in that union were extorted, the actions of Local 560 were affected, which, in turn, resulted in affecting interstate commerce through businesses involved in interstate commerce. Accordingly, the district court was not clearly erroneous in finding that the extortion of membership rights affected, in some minimal way, interstate commerce.

418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (right to solicit business accounts).

Moreover, at least one court has expressly addressed the question of whether rights incident to union membership are protectible property interests. In *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. Ulster County), *modified on other grounds and aff'd*, 31 N.Y.S.2d 849 (1941), the court held that such rights are "as real and as needful of equitable protection, surely, as money or chattels."

> The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

29 N.Y.S.2d at 884. This holding is significant because the Hobbs Act's definition of extortion was closely modelled on that in the New York statute and Congress intended that extortion as used in the Hobbs Act reflect the common understanding of the states. *See United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973). Thus, we conclude that the membership's intangible property right to democratic participation in the affairs of their union is properly considered extortable "property" for purposes of the Hobbs Act.[16]

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16. This Court's decision in United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), does not dictate

(2)

The defendants argue, alternatively, that section 530[17] of the LMRDA, 29 U.S.C. § 530, is the exclusive criminal sanction for violating a union member's rights, and that, therefore, the district court erred in concluding that the extortion of membership LMRDA rights could also constitute a Hobbs Act violation. The

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otherwise. In *Boffa*, this court held that the RICO predicate act of mail fraud, 18 U.S.C. § 1341, may encompass a scheme to deprive union members of the right to the "honest and faithful" services of union officals as provided in section 501 of the LMRDA, 29 U.S.C. § 501, but may *not* encompass a scheme to deprive employees of rights created by section 7 of the NLRA, 29 U.S.C. § 157. In *Boffa*, we rejected the argument that a violation of union rights under section 7 of the NLRA may be characterized as a RICO predicate act because of the "remedial nature of the [NLRA] and the primacy of the National Labor Relations Board in resolving unfair labor practice disputes." 688 F.2d at 927.

However, *Boffa*'s conclusion with regard to section 7 of the NLRA is inapposite here since the NLRB does *not* have primary jurisdiction over the democratic rights created by section 411 of the LMRDA -- the rights at issue in the present case. Under section 412 of the LMRDA, 29 U.S.C. § 412, union members have a direct cause of action against the union and its officers for infringement of their section 411 rights.

17. Section 530 of the LMRDA provides:

> It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

29 U.S.C. § 530.

defendants maintain that the government may not apply the Hobbs Act in the present RICO context because Section 530 of the LMRDA, which was enacted subsequent to the Hobbs Act and which punishes the same proscribed behavior as the Hobbs Act, preempts the Hobbs Act in this case. *See generally Morton v. Mancari*, 417 U.S. 535 (1974) (in certain instances a specific statute governs over a more general one).[18] The government counters that section 530 does not limit the applicability of the Hobbs Act to the facts of the present case because section 530 and the Hobbs Act were designed to prohibit different types of conduct. We are satisfied that, because the underlying purpose and design of section 530 is different from that of the Hobbs Act, section 530 does not supercede the use of the Hobbs Act in the instant case. While the Hobbs Act, as evidenced by its explicit and unambiguous language, was designed to combat extortion, section 530 of the LMRDA makes no mention of "extortion" and rather appears to focus on prohibiting physical assaults on members in connection with a union's internal affairs and in the exercise of their statutory rights. In this regard, we note that Senator Morse, in opposing the passage of section 530, stated:

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18. If the defendants' argument were to succeed, the government would have failed to prove that the Executive Board violated § 1962(b) because, the defendants allege, § 530, the preemptive section, is not a predicate act under RICO. *See* 18 U.S.C. § 1961(1). In such a case, of course, the Executive Board could not have aided and abetted the Provenzano Group in a violation of the RICO Act.

As the text reveals, we decline to accept this argument. Rather, we hold that in the present context, the Hobbs Act is not displaced by § 530, and hence, the Hobbs Act violations found by the district court satisfy the predicate act requirement of § 1962(b).

> Generally speaking, the effect of these provisions is to make assault and battery a Federal crime, but only when it occurs in a union. I have already referred above to the inappropriateness of provisions of this type for the enforcement of the rights of union members.

105 Cong. Rec. 16,389 (1959). The limited reach of section 530 is also demonstrated by the language of the LMRDA which states that the Act was enacted as "*further* and *supplementary* legislation that will afford necessary protection of the rights and interests of employees and the public generally." 29 U.S.C. § 401(b) (emphasis added).

Section 530, in relevant part, prohibits "the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate . . . any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter . . . ." 29 U.S.C. § 530. Although this language of section 530 is broad, and conceivably could cover extortionate conduct, we observe that those cases which have construed section 530 have all involved some form of assault and battery. *See United States v. Williams*, 624 F.2d 75 (9th Cir. 1980) (defendant hired individual to assault union member); *United States v. Kelley*, 545 F.2d 619 (8th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977) (defendant fired three shots at truck carrying three union members); *United States v. Bertucci*, 333 F.2d 292 (3d Cir.), *cert. denied*, 379 U.S. 839 (1964) (fight involving union members); *United States v. Roganovich*, 318 F.2d 167 (7th Cir.), *cert. denied*, 375 U.S. 911 (1963) (fight involving union members).

In contrast, cases brought under the Hobbs Act frequently involve schemes to extort through the

creation of indirect fear. *See, e.g., United States v. Hedman*, 630 F.2d 1184, 1194 (7th Cir. 1980) (extortion found although victim "happy" to make payments and relations between victim and extorters was "cordial"), *cert. denied*, 450 U.S. 965 (1981); *United States v. Sander*, 615 F.2d 215 (5th Cir.) (Hobbs Act covers fear of economic loss and "subtle extortions"; government need not show that fear was direct consequence of threat or that victim personally feared extorter), *cert. denied*, 449 U.S. 835 (1980).

Here, of course, the extortion of rights which the government's complaint charged was achieved, not so much by direct physical assault (as is proscribed by section 530), but by more sophisticated and indirect physical and economic threats. It was intimidation and fear, as found by the district court, that caused the members of Local 560 to surrender their LMRDA democratic rights. The Hobbs Act, much more so than section 530, is designed to combat extortion, whether such extortion involves LMRDA rights or more tangible property.

C.

In the preceding sections of Part III of this opinion, where we discussed the Hobbs Act as a predicate act under § 1962(b), we held that the district court did not err when it concluded that both the Provenzano Group and the Executive Board had extorted the rights of Local 560's members and that the acts of extortion came within section 1962(b) of RICO. In so concluding, the district court held that the Executive Board had aided and abetted the extortionate acts. Specifically, the district court held that the Executive Board defendants aided in extorting member's rights by (1) making certain appointments and reappointments to union offices; (2) failing to remove certain appointees from office; (3) spending union assets for Anthony

Provenzano: (4) permitting access to local 560's offices by known or reputed criminals: and (5) being recklessly indifferent to the above-mentioned systematic misconduct of fellow incumbent officers. App. at 96-97, 148-150. These actions by the Executive Board defendants -- particularly the appointment of known criminals to union office and the expenditure of union assets for Anthony Provenzano -- aided and abetted the Provenzano Group in establishing the climate of fear and intimidation found to exist within Local 560 by the district court. These actions, in turn, coerced a substantial portion of the membership into relinquishing their LMRDA rights. The district court concluded that, because of the offenses committed by the Executive Board, the members of that board had to be removed from office to "prevent and restrain" future violations of section 1962 of the RICO Act.

The defendants argue that the district court misapplied the law of aiding and abetting to the actions of the Executive Board. The defendants maintain that, while the Executive Board may have violated certain fiduciary standards, the Board's actions did not constitute criminal aiding and abetting.

However, the district court did, in fact, rely on the appropriate test for establishing liability under the aiding and abetting statute, 18 U.S.C. § 2. In *United States v. Dixon*, 658 F.2d 181, 189 n.17 (3d Cir. 1981), this Court held that:

> In order to convict a defendant of aiding and abetting the commission of a crime, the Government must prove two essential elements: (1) that the substantive crime has been committed; and (2) that the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it.

We conclude, as did the district court, app. at 140, that, although the present case is civil in character, the criminal standard for aiding and abetting applies. Applying the *Dixon* two-part test, the district court examined the surrounding circumstances and found not only that the substantive crimes had been committed, but that the Executive Board defendants knew of their commission and demonstrated the requisite intent.

The defendants, citing the district court's discussion of the elevated duty of care owed to union members by their officers, argue that the district court found liability based on the Executive Board's violation of fiduciary responsibility rather than on the Executive Board's criminal intent. We do not, however, agree with the defendants' reading of the district court's opinion. The district court addressed the ethical duty that union officers owe membership for the purpose of examining the extortion of LMRDA rights in the correct light. As the district court noted, "the knowledge and volitional act requirements of *Dixon*'s second element have different meanings in various contexts." App. at 140. Thus, the district court simply recognized that, if an individual fails to act when he has an affirmative duty to do so, negative inferences concerning his intent can be drawn from this inaction. Moreover, it has long been settled that it is permissible to infer from circumstantial evidence the existence of intent. *United States v. Burrell*, 496 F.2d 609, 610 (3d Cir. 1974).

The defendants further argue that the district court was clearly erroneous in finding that the Executive Board's (1) repeated appointments; (2) failure to remove appointees from office; (3) expenditure of union assets for Anthony Provenzano; and (4) allowance of access to Local 560 offices by known or reputed criminals, aided the Provenzano Group in extorting the membership's rights. We

disagree. Our reading of the record discloses ample evidence supporting the district court's subsidiary findings as well as its ultimate finding of aiding and abetting. Indeed, in our view, the evidence of Local 560's history of appointments of individuals with criminal convictions to positions of responsibility within the union, not to mention the expenditure of union funds for the personal benefit of Anthony Provenzano, more than adequately support the district court's finding.

(1)

With regard to the repeated appointments to union office by the Executive Board of known or reputed criminals, the following chronology by the district court is instructive:

> (a) During September of 1961, Anthony Provenzano and other members of the Local 560 Executive Board (which then included Salvatore Provenzano) appointed Salvatore Briguglio to the position of Business Agent -- notwithstanding the fact that Anthony Provenzano then knew that Salvatore Briguglio had murdered Anthony Castellitto, and notwithstanding the fact that rumors to that effect were circulating among the membership at that time.
>
> (b) On or about February 1, 1963, Anthony Provenzano and the other Executive Board members (including Salvatore Provenzano) appointed Nunzio Provenzano to the position of Business Agent -- notwithstanding the fact that three days earlier, on January 29, 1963, Nunzio Provenzano had been convicted (together with Salvatore Briguglio) of an offense involving a payoff demand.

(c) In 1964, Anthony Provenzano and the other Executive Board members (including Salvatore Provenzano) appointed Robert A. Luizzi to the position of Business Agent -- notwithstanding the fact that Luizzi had been convicted in 1945 of a felonious assault and battery and in 1949 of felonious breaking and entry, and had been arrested on four separate occasions thereafter in Hudson County of Disorderly Person, Aggravated Assault, Deadly Weapon and Aiding and Abetting a Robbery.

(d) On or about May 15, 1967, Salvatore Provenzano and the other Executive Board Members appointed Robert A. Luizzi to the position of Trustee -- notwithstanding his criminal record as outlined in (c) above.

(e) On or about April 25, 1969, Salvatore Provenzano and J.W. Dildine and the other members of the Local 560 Executive Board appointed Salvatore Briguglio to the position of Business Agent -- notwithstanding the fact that Salvatore Briguglio had just completed the term of imprisonment for his 1963 conviction in New York State.

(f) On or about April 25, 1969, Salvatore Provenzano, J.W. Dildine and the other Executive Boartd members appointed Nunzio Provenzano to the position of "clerk" at the uniquely high salary of some $18,000 per year -- notwithstanding the fact that Nunzio Provenzano had just completed the term of imprisonment for his 1963 conviction in New York State, and was forbidden by the terms of his parole from being an officer in the union.

(g) In 1970. Salvatore Provenzano. J.W. Dildine and the other Executive Board members appointed Thomas Reynolds. Sr. to the position of Business Agent -- notwithstanding the fact that Thomas Reynolds. Sr. had pled guilty in 1948 to misdemeanor assault (having been charged with felonious assult). had been convicted in 1958 of felony robbery and had been arrested on five separate occasions for rape (1948). grand larceny (1952). rape (1961). armed robbery (1961). and as a material witness (and. in the minds of some. suspect) in the murder of Walter Glockner (1963).

(i) In 1970. Salvatore Provenzano. J.W. Dildine and other members of the Local 560 Executive Board appointed Nunzio Provenzano to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Pension and Welfare Funds -- notwithstanding the fact of his previous conviction and incarceration in New York State.

(j) In 1972. Salvatore Provenzano. J.W. Dildine and the other Executive Board members appointed Salvatore Briguglio to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Pension and Welfare Funds -- notwithstanding the fact of his previous conviction and incarceration in New York State. and notwithstanding the fact that pervasive rumors had linked him to the "disappearance" of Anthony Castellitto.

(k) On or about January 25. 1973. Salvatore Provenzano. J.W. Dildine and the other Executive Board members appointed Nunzio Provenzano to the position of Secretary-Treasurer -- notwithstanding his prior conviction and incarceration.

(l) On or about September 12, 1975, Salvatore Provenano [sic], J.W. Dildine and the other members of the Executive Board appointed Thomas Reynolds, Sr. to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Pension and Welfare Funds -- notwithstanding his criminal record and rumored involvement in the Glockner murder.

(m) In February 1974, Salvatore Provenzano, Nunzio Provenzano, J.W. Dildine and the other members of the Local 560 Executive Board reappointed Salvatore Briguglio to the position of Business Agent -- notwithstanding the fact that Salvatore Briguglio had just completed a term of imprisonment on a federal counterfeiting conviction.

(n) On or about March 12, 1974, Salvatore Provenzano, Nunzio Provenzano, J.W. Dildine and the other members of the Local 560 Executive Board appointed Robert A. Luizzi to the position of Trustee of the Trucking Employees of Passaic and Bergen Counties Welfare and Pension Fund -- notwithstanding his criminal record as outlined above.

(o) On or about November 24, 1975, Salvatore Provenzano, J.W. Dildine and the other Executive Board Members appointed Anthony Provenzano and Nunzio Provenzano to the positions of Secretary-Treasurer and President, respectively -- notwithstanding the fact that Anthony Provenzano had been convicted of labor racketeering and Nunzio Provenzano had been convicted of a felony involving a payoff demand.

(p) On or about February 9, 1977, Anthony Provenzano, Salvatore Provenzano, Nunzio

Provenzano, J.W. Dildine and the other members of the Executive Board appointed Thomas Reynolds, Sr. to the position of Trustee of Local 560 -- notwithstanding his criminal record and his rumored involvement in the Glockner nurder.

(q) In 1981, Nunzio Provenzano, Salvatore Provenzano, Joseph Sheriden, Josephine Provenzano, J.W. Dildine, Thomas Reynolds, Sr., Stanley Jaronko and Michael Sciarra, as members of the Executive Board of Local 560, appointed Robert A. Luizzi to the position of Business Agent -- notwithstanding the fact that Luizzi had a criminal record involving crimes of violence, and notwithstanding the fact that Luizzi had been identified in sworn testimonty as having solicited labor peace payoffs or bribes from Helms Express, a trucking company then under contract with Local 560.

App. at 89-93.

Despite this lurid history, the defendants maintain that none of the appointments "violated any law". The fact, however, that these appointments were in technical compliance with the federal law concerning union officer eligibility[19], does not mean that the appointments did not serve to intimidate the rank and file, and thus extort LMRDA rights in violation of the Hobbs Act.[20] Indeed, the district court

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19. At the time these appointments were made, 29 U.S.C. § 504 barred individuals convicted of certain felonies from holding union office for a five year period. Section 504 of the LMRDA was amended in 1984 to, in part, extend the disability from five years to thirteen years.

20. The defendants' argument that the Executive Board cannot be held culpable for the appointments so long as the appointments were in compliance with 29 U.S.C. § 504, is misguided. Indeed, it was Congress' intent that the LMRDA should in no way limit the

found that the history of Provenzano Group appointments to union office did cause a substantial portion of Local 560's membership to surrender their right to democratic participation in the affairs of the union. Since the district court's findings - both subsidiary and ultimate - are well supported by the record, we decline to disturb them.[21] *See Anderson v. City of Bessemer*, ___ U.S. ___, 105 S.Ct. 1504 (1985).

(2)

The district court also held that the Executive Board's expenditure of Local 560 assets (in the form of accrued salary and pension payments) for the benefit of Anthony Provenzano, who had three times committed offenses while in office, helped (aided and abetted) in extorting the membership's LMRDA rights. With regard to the payment of accrued salary, the record indicates that on December 20, 1962, approximately one month after Anthony Provenzano had been indicted in the Eastern Freightways case, defendant Michael Sciarra made a successful motion at a membership meeting to increase Anthony Provenzano's yearly salary from $20,800 to $45,800. One week earlier Provenzano had won re-election as Local 560 President and had previously been appointed an International vice-president under Jimmy Hoffa.

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responsibilities which union officers have under other federal laws. 29 U.S.C. § 523(a) provides, in relevant part, that "nothing in the [LMRDA] shall reduce or limit the responsibilities of any labor organization or any officer . . . ."

21. We also find unpersuasive the defendants' contention that the Executive Board members were not aware of the criminal backgrounds of Luizzi or Reynolds at the time of their appointments. Both individuals had fairly extensive criminal histories and, in light of the entire record, the district court's finding that the Executive Board was aware of the criminal background of both individuals cannot be regarded as clearly erroneous.

who was then President of the Teamsters International union. Sciarra stated that he made the motion because Provenzano needed the money for his legal expenses. Within two months, on February 14, 1963, Stephen Andretta made a second motion to increase Provenzano's salary. This time, Provenzano's annual salary was increased from $45,800 to $95,000. Andretta stated that he made the motion because he felt that Provenzano should be paid as much as Hoffa, who was then making $100,000 a year.

On March 13, 1963, Anthony Provenzano told the membership that he was "not taking a penny of the increases offered me by the membership" and would not do anything to "impoverish" the union. In mid-1966, Anthony Provenzano was incarcerated and on July 21, 1966, the membership, upon the motion of Michael Sciarra, voted to reduce the salary for the office of the President from $95,000 to $20,800 - effective upon the appointment of Salvatore Provenzano as President on May 6, 1966.

On January 30, 1969, Anthony Provenzano, who was still in prison, told his attorney to mail a letter to Local 560 requesting that it issue a check to him in the amount of $25,000 "on account of back salary due and owing to him." In response, the Executive Board, after consultation with attorneys and accountants, paid to Provenzano approximately $25,000 a year from 1969 through 1976, a total of about $197,850. These payments represented all but approximately $48,785 of the money which Anthony Provenzano would have received as a result of these salary increases. The payments were stopped by the Local in 1976 because the officers believed that the union could not afford to continue the outlays. The only year that Anthony Provenzano was in office during the time he received payments was 1976.

With respect to these salary payments, the district court stated:

> Local 560 received no benefit in exchange for the payment of these funds to Anthony Provenzano. Contrary to his representation to the membership on March 13, 1963, the payments . . . did in fact 'impoverish' the Local. His ability to extract these payments from Local 560 provides further evidence of the strength and domination of the Provenzano Group and its exploitation of Local 560 for its own purposes.

App. at 73.

Anthony Provenzano, however, not only received accrued salary from Local 560, but also received a pension bonus. On November 9, 1976, when Anthony Provenzano had returned to the union as Secretary-Treasurer following his prison sentence in the Dorn case (and his five year ineligibility period arising out of his conviction), it came to the Local's attention that, because of a break in his union service, Anthony Provenzano would not receive a pension from the Teamsters. The Local then voted to pay Anthony one-half his weekly salary at the time of retirement as a pension benefit. Payment of his one-half salary began in 1979 and continued through 1981, when it was voluntarily terminated pending the outcome of this litigation. Regarding these pension benefits, the district court held:

> In his testimony, Salvatore Provenzano stated that he had "no idea" how Local 560 would benefit from the payment of this one-half pension. Trustee Michael Sciarra also knows of no benefit to Local 560 which flows from these payments other than to keep "the members happy -- they voted for it." The ability of the Provenzano Group to exact these

> payments is clearly demonstrative of its strength, influence and continuing ability to control and exploit Local 560 for its own purposes -- at the expense of the membership.

App. at 84.

The district court found that neither the salary increases nor the pension payments were in the best interests of Local 560 or its membership, but rather that these payments were solely for the personal benefit of Anthony Provenzano. The district court also found that the Executive Board, by failing to take the position that the payments were not in the union's interest[22], intentionally aided and abetted in the Provenzano Group's further extortion of membership rights.[23] We hold that the district court's findings concerning payments made to Anthony Provenzano were not clearly erroneous and the district court did not err when it concluded that these payments represented an additional Hobbs Act extortion by the Provenzano Group and the Executive Board.[24]

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22. The district court found that the payments made to Anthony Provenzano were not in the interest of the union. The defendants argue that the district court should not have second-guessed the Local concerning a matter upon which the membership voted. We find this argument unpersuasive in light of the district court's findings of intimidation and fear leading to coerced judgments on the part of Local members.

23. Under 29 U.S.C. § 501(a), the officers of a union have an affirmative obligation to hold union money "solely for the benefit of the organization." The Executive Board's failure to take affirmative action to suspend these payments was circumstantial evidence that the Executive Board intended to aid the Provenzano Group.

24. The district court also held that (1) the Executive Board's failure to remove both Salvatore Briguglio as business agent in December 1975 (after FBI agents recovered ammunition from his file cabinet during a search for guns at the union offices) and Nunzio Provenzano as President in May 1981 (after he was

(3)

Finally, the defendants argue that certain members of Local 560's Executive Board, namely Joseph Sheridan and Josephine Provenzano (who were appointed in 1978) and Michael Sciarra and Stanley Jaronko (who were appointed in 1981), were not members of the Executive Board when many of the Hobbs Act extortions occurred. As a result, the defendants maintain that these Executive Board members did not aid and abet[25] the necessary two predicate offenses under the RICO Act.

However, the record does not support this contention. Rather, the evidence discloses that Michael Sciara and Stanley Jaronko, the most recent members of the Executive Board, aided and abetted in at least two predicate Hobbs Act extortions. For example, Anthony Provenzano's pension payments, which represented a Hobbs Act extortion, extended through 1981. Each Executive Board member, by not objecting to these payments which did not benefit the union, necessarily aided and abetted in the extortion. During

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convicted in the City-Man case but before he was sentenced) and (2) the Executive Board's toleration of known and reputed criminals visiting union offices, also intensified the climate of intimidation in Local 560 and constituted separate Hobbs Act extortions. We agree that the purpose and effect of these actions was to extort the membership's rights through intimidation and fear. Moreover, we note that fear can be invoked in subtle and indirect ways. *See e.g.* United States v. Zito, 467 F.2d 1401, 1405 (2nd Cir. 1972) (the mere mention of the name of a known criminal can instill fear).

25. We conclude that under RICO, an individual need not himself commit two requisite predicate offenses, as long as that same individual aids and abets the commission of the predicate offenses. Indeed, there is no authority to suggest that 18 U.S.C. § 2(a) does not apply to RICO. Under 18 U.S.C. § 2(a), whoever "aids, abets, counsels, commands, induces or procures [the commission of an offense against the United States] is punishable as a principal."

that time period, both Sciara and Jaronko were on the Executive Board.

In addition, in 1981, the Executive Board appointed Robert Luizzi to the position of Business Agent -- notwithstanding Luizzi's criminal record. The district court held that Luizzi's appointment, and similar appointments, also constituted part and parcel of the extortion of membership rights under the Hobbs Act. Further, in 1981, the Executive Board refused to remove Nunzio Provenzano from office, despite the fact that he had been convicted in the City-Man case. As noted, during this period, the four members of the Executive Board who the defendants claim did not aid and abet the extortionate activities found by the district court, were active members of the Board.

Thus, each individual Executive Board member has aided and abetted in at least two predicate acts, and accordingly, each such member is, in his or her own right, culpable for the extortion of the membership's rights. *See United States v. Stubin*, 446 F.2d 457, 463 (3rd Cir. 1971).

IV.

Having thus far determined that the district court did not err in concluding that the membership's rights to democratic participation in Local 560 were extorted by the Provenzano Group and the Executive Board in violation of § 1962(b) of the RICO Act, the question remains whether the Provenzano Group was properly characterized by the district court as a "person" for purposes of 1962(b) and an "enterprise" for purposes of section 1962(c) of the RICO Act. As stated earlier, section 1962(b) of the RICO Act prohibits any "person" from acquiring an interest in and control of any "enterprise" through a pattern of racketeering activity.

18 U.S.C. § 1962(b).[26] Section 1962(c) makes it unlawful for any "person" to conduct or participate in the affairs of an "enterprise" through a pattern of racketeering activity. Referring to Section 1962(b), the district court determined that the Provenzano Group was a "person", and that Local 560 was the "enterprise"[27] in which the Provenzano Group acquired an interest. The district court, then referring to section 1962(c), held that the named Provenzano Group defendants - as individuals - were "persons" for purposes of that section, and that the Provenzano Group, as a separate entity, represented an "enterprise".

A.

The defendants, relying primarily on *Haroco, Inc. v. American National Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, ___ U.S. ___, 105 S.Ct. 3291 (1985) (per curiam opinion),[28] argue that the Provenzano Group cannot be properly characterized as

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26. In Hirsch v. Enright, 751 F.2d 628, 633-34 (3d Cir. 1984), this court held that for purposes of a single violation of § 1962(b), the same entity cannot be both a "person" and an "enterprise." In so holding, *Hirsch* recognized that the district court in this case had not committed that error. Accordingly, *Hirsch* distinguished the *Hirsch* situation from the reasoning and holding of the district court in United States v. Local 560, 581 F. Supp. 279 (D.N.J. 1984). *See Hirsch*, 751 F.2d at 634.

27. The defendants do not dispute that Local 560 is properly an "enterprise" under 18 U.S.C. § 1962(b).

28. The Supreme Court, subsequent to argument in the present appeal, affirmed the Seventh Circuit's opinion in Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, ____ U.S. ____, 105 S. Ct. 3291 (1985), without addressing the question of what constitutes a "person" for purposes of the RICO Act.

a "person" under section 1962(b) of the RICO Act. Section 1961(3) of the RICO Act defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). The defendants cite to dicta in the Seventh Circuit's *Haroco* opinion, which states that:

> Where persons associate "in fact" for criminal purposes, *see* [*United States v. Turkette*, 452 U.S. 576, 583 (1981)], each person may be held liable under RICO for his, her or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity. But the nebulous association in fact does not itself fall within the RICO definition of "person" . . . . In the association in fact situation, each participant in the enterprise may be a "person" liable under RICO, but the association itself cannot be.

Id. at 401.

In the instant case, however, the district court did not treat the Provenzano Group as a "nebulous association in fact". Rather, the district court, as the government suggests, regarded the Provenzano Group as representing a conspiracy of seven identifiable, culpable individuals. As we read and understand the district court's discussion, the term "Provenzano Group" was utilized by the district court as simply a convenient appellation for the collective defendants and was not meant to represent, in itself, a "person" for purposes of 1962(b). Indeed, the individual conspirators in question were included as named defendants in the government's complaint and were identified by name in the district court opinion. Moreover, the district court held that "*the culpability of the individual associates of the Provenzano Group under § 1962(b)* . . . has been established by their own conduct." App. at 147 (emphasis added). Thus, while

the district court might have been more explicit in its holding, it is the individual Provenzano Group defendants who are the "persons" for purposes of 1962(b) and not the Provenzano Group as a separate entity.[29]

B.

The district court also held, and the defendants hotly contested, that the Provenzano Group is an "enterprise" for purposes of section 1962(c) of the RICO Act. Section 1961(4) of the RICO Act broadly defines an "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

In *United States v. Riccobene*, 709 F.2d 214, 221 (3rd Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 157 (1984) this Court limited the definition of "enterprise", holding that, to establish an enterprise as defined by section 1961(4), the government must demonstrate "evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit. In addition, the enterprise must be shown to have an existence 'separate and apart from the pattern of activity in which it engages.'" (Citations omitted) *See also United States v. Turkette*, 452 U.S. 576 (1981).

In the instant case, the district court applied the *Riccobene* standard and found that the individuals forming the Provenzano Group as well as the

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29. As noted, the government argued that the Provenzano Group itself could be a person. Brief for Appellee at 37-38, and the district court so held. App. at 133. We cannot say that the district court's holding was in error, although in light of our discussion respecting the individual Provenzano Group defendants, we need not rely on that point.

Provenzano Group itself have "maintained an ongoing organizational structure in the form of a hierarachy and protocol during approximately the past thirty-five years." App. at 62. The court then held the Provenzano Group to be an "enterprise" for purposes of its analysis under section 1961(c), and concluded that the individual Provenzano Group associates had conducted the affairs of the enterprise through a pattern of racketeering activity.

The defendants take issue with this holding on two separate grounds: 1) that the district court changed the theory of the government, which originally regarded Local 560 as the section 1962(c) enterprise, and 2) that the court was clearly erroneous in finding that the Provenzano Group had continued vitality. We find no merit in either contention.

First, although the district court's analysis may have taken a somewhat different tack than that originally presented in the government's complaint, the district court correctly found that the defendants were on notice of this alternative theory and that it was fully litigated with the implied consent of the defendants. App. at 61 n.15. Moreover, the complaint itself specifically charges that the Provenzano Group defendants "associated together in fact as an enterprise (the Provenzano Group) within the meaning of Section 1961 of Title 18 of the United States Code." App. at 188. The question of whether the Provenzano Group was an "enterprise" was therefore properly before the district court, and it was not prejudicial to the defendants for the court to base its holding in part on this finding.

The defendants further argue, however, that even if this theory was properly before the district court, the court's finding was irrelevant to the relief sought and granted with respect to Local 560: the only relevant

question, argue defendants, was whether the individual Provenzano defendants conducted the affairs of *local 560* through a pattern of racketeering activity such as to justify the relief granted. Irrespective of the labels applied, however, the district court's findings amply supported a holding under section 1962(c).

.Therefore, to the extent it may be deemed necessary to our holding, we reject the assertion that the district court was clearly erroneous in finding that the Provenzano Group is an ongoing enterprise within the meaning of section 1961(4). As noted below, ample evidence supported this factual conclusion. However, we find it unnecessary to rely on this finding, because the district court's findings of individual liability and vicarious liability for acts of co-conspirators fully support its ultimate holding that the individual Provenzano Group associates ("persons" within the meaning of RICO) violated both section 1962 (b) and (c). Moreover, while it was not necessary for the district court to regard the Provenzano Group to be a formal "enterprise" under section 1961(4), the district court in so holding did not err, particularly since it concluded that the individual defendants are part of a continuing criminal association justifying the relief granted.

The district court, in reaching its conclusion, relied heavily on the testimony of Salvatore Sinno.[30]

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30. Contrary to the defendants' position, we find that Sinno's testimony was properly admissible against the current Executive Board members despite the fact that the current Executive Board members were not appointed until after 1961 (when Sinno left the Provenzano Group). The Executive Board members are bound by the prior acts and statements made by their co-conspirators, so long as the statement and acts were designed to further the conspiracy. United States v. Sarno, 456 F.2d 875, 878 (1st Cir. 1972).

Sinno, an early associate of Anthony Provenzano and a member of the Provenzano Group, is one of only two Provenzano Group members to turn state's evidence. Sinno, who assisted in the murder of Anthony Castellitto, was one of the chief witnesses against Anthony Provenzano and others at the Castellitto murder trial.

Sinno testified at the instant trial about the formation of the Provenzano Group in the late 40's and that Group's niche within the Genovese crime family of New York - headed for a time by "Lucky" Luciano. According to Sinno, Anthony Provenzano was a "made member" ("button man" or "soldier") of the Genovese organization in addition to being the leader of the Provenzano Group. Members of the Provenzano Group in the early 1960s included Nunzio Provenzano, Sinno, and Salvatore Briguglio. Sinno stated that the Genovese family permitted the Provenzano Group during this time to participate in certain criminal activities (such as illegal gambling and labor racketeering) but prohibited the Group from engaging in other crimes (such as narcotics, prostitution, and counterfeiting).

Sinno's testimony indicates that, from the early 1940's to 1961 (when Sinno disassociated himself from the Provenzano Group), the Provenzano Group was a continuing criminal organization which was affiliated with an even larger criminal confederation.

The district court also regarded the many criminal convictions of Provenzano group members over the past thirty years - (convictions, which also represented RICO predicate acts for purposes of sections 1962(b) and (c)) - as a strong indication that the Provenzano Group is still an ongoing criminal organization. These offenses, which include the Dorn labor peace payoffs, the Castellitto murder, the Seatrain labor peace payoffs, the Roman loan kickbacks, and the City-Man

labor peace payoffs, *see supra* typescript at 13-14,[31] all implicate the same core of individuals, and illustrate the insular nature of the Provenzano Group. The defendants maintain that these crimes do not represent evidence of an "enterprise" but rather should

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31. The defendants also argue that the district court relied on predicate acts of racketeering that were time-barred by the ten-year provision contained in section 1961(5) of the RICO Act. RICO prohibits a person from engaging in a "pattern of racketeering activity." 18 U.S.C. § 1962(b). A "pattern of racketeering activity" under section 1961(5) of the RICO Act, requires "at least two acts of racketeering activity, one of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The defendants maintain that this limitations period limits predicate acts to only those offenses which occurred ten years (plus time for incarceration) prior to the most recent predicate act (in the instant case, the extortion of membership rights in 1982). Under the defendants' theory, RICO provides for a ten-year (plus incarceration) maximum time period from the date of the most recent predicate act, in which to find all the other predicate acts. The defendants, therefore, would exclude many of the early predicate acts (such as the 1961 murder of Anthony Castellito).

However, the plain language of section 1961(5) does not demand such a limited ten-year maximum time period for predicate acts. Of course, if there are only two (the minimum number) predicate acts, these acts must be within 10 years of each other If there are more than two, however, the RICO Act does not require that they all fall within the same ten-year period. Rather, section 1961(5) requires only that the last predicate act occur within ten years (plus time for incarceration) of the commission of "a prior act." If the defendants' position were correct, then section 1961(5) would require the last predicate act to occur within ten years of the commission of "*the most recent act*", rather than "*a prior act.*" Even a cursory review of the extortionate acts found by the district court which impacted on the rights of Local 560's members (which occurred as recently as 1981 with respect to pension payments and appointments to union office) reveals the inheren' flaw in the defendants' argument. *See* sections III A and B, *supra*. Accordingly, we conclude that the district court did not rely on time-barred predicate acts.

be regarded as "disparate events, spread over two decades, and involving numerous people." However, considering these crimes in conjunction with Sinno's testimony, as we observed earlier, we cannot say that the district court was clearly erroneous in finding that the Provenzano Group was an "enterprise" under section 1962(c), even though such a finding was unnecessary in light of the district court's contemporaneous finding that the Provenzano Group defendants were individually culpable under that section. We observe that the district court also took note of the fact that, over the 30 year history of the Provenzano Group, only two associates (Sinno and Picardo) have defected. To the district court, this indicated an impressive degree of "internal discipline, loyalty, and perserverance." App. at 105.[32]

The defendants also argue that the government's case should be barred under the laches doctrine. However, despite the fact that it is the defendants' burden to prove laches, *see* Minnesota Mining v. Berwick Industries, Inc., 532 F.2d 330, 334 (3d Cir. 1976), they have made no showing, beyond a conclusory declaration, that (1) the government inexcusably delayed in bringing this civil RICO action, and (2) the defendants were prejudiced by the delay. *See* Churma v. United States Steel Corp., 514 F.2d 589, 593 (3d Cir. 1975). We therefore reject this argument as well.

32. The district court also found that the deposition of Andrew Reynolds demonstrated the "continued vitality and viability of the Provenzano Group." App. at 66. On August 17, 1982, Andrew Reynolds, then a Business Agent for Local 560, was deposed. At this deposition, Reynolds invoked his Fifth Amendment privilege in refusing to answer, among other things, (1) whether he knew Matthew Ianniello (an alleged member of the Genovese Crime Family); (2) whether Ianniello and the Genovese Family control Local 560 through Reynolds and others, and (3) whether he knew Funzi Tieri (a reputed organized crime figure). At trial, the district court, after admitting Reynold's deposition into evidence, drew an adverse inference from Reynold's invocation of the Fifth Amendment. *See* Baxter v. Palmigiano, 425 U.S. 308 (1976), finding that Reynolds was a member of the Provenzano Group. App. at 62.

Against this backdrop of continued criminal activity, it is difficult to accept the defendants' argument that the Provenzano Group is now defunct. The defendants point out that of the original Provenzano Group:

(1) Anthony Provenzano is now incarcerated for life. They also emphasized that Anthony

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We find, however, that, even assuming Reynold's testimony was properly admitted into evidence, it was inappropriate for the district court to have drawn an adverse inference from Reynold's failure to respond. In *Baxter*, the Supreme Court held that in a civil case the finder of fact may draw an adverse inference from a party's invocation of his Fifth Amendment right against self-incrimination. The Court recognized, however, that there must be sufficient independent evidence - besides the mere invocation of the privilege - upon which to base the negative inference. *See also* National Acceptance Co. of America v. Bathalter, 705 F.2d 924 (7th Cir. 1983).

In the instant case, we find that there is not a sufficient evidentiary foundation which can support the district court's negative inference. The district court based its inference solely on the fact that (1) Reynolds was observed meeting with Nunzio Provenzano and Bobby Manna and with Nunzio Provenzano and Matthew Ianniello and (2) Reynolds was appointed as a Business Agent by the Local 560 Executive Board. These facts, without more, cannot support the district court's inference. We note as well that there exists no testimony which, directly or indirectly, links Reynolds with the other members of the Provenzano Group. On such a record, we believe that the district court erred in finding Reynolds to be a member of the Provenzano Group and thus inferring the continued vitality of the Provenzano Group from Reynold's invocation of his constitutionally guaranteed privilege. At the same time, however, we find that the district court's conclusion that the Provenzano Group is an ongoing and viable organization is sufficiently supported by Sinno's testimony and the evidence of criminal convictions. Thus, while the district court erred in drawing an inference from Reynold's testimony, that error was harmless in light of the independent evidence supporting the district court's conclusion. *See* DeLaval Turbine, Inc. v. West India Industries, Inc., 502 F.2d 259 (3d Cir. 1974), discussed in text, *supra*, at typescript 24.

Provenzano had also entered into a consent judgment in this case which effectively barred him from labor related activities.

(2) Salvatore Briguglio is dead.

(3) Nunzio Provenzano is currently serving a 10 year prison term. to be followed by a period of statutory disability. Nunzio Provenzano is a signatory to the same consent judgment which his brother. Anthony Provenzano. entered.

(4) Thomas Andretta is currently serving a 20 year prison term. and is a party to the consent judgment.

(5) Stephen Andretta. recently paroled from a prison term. cannot immediately hold union office as he is subject to the statutory disability period of the LMRDA.

(6) Gabriel Briguglio. currently on parole. is also subject to the statutory disability.

Nevertheless. the record clearly demonstrates that even incarceration. much less ineligibility to hold union office. does not prevent members of the Provenzano Group from committing acts of extortion. For example. during periods in which Anthony Provenzano was either incarcerated or subject to statutory disability. he sought and received his increased salary and pension payments. received the Romano Loan kickbacks.[33] and received his Seatrain

33. The district court found that Anthony Provenzano received kickbacks from Thomas Romano in exchange for helping Romano receive certain real estate loans. The kickbacks took the form of the below-market sale of two houses in Florida by Romano and his associates to Anthony Provenzano. The district court found that the first house. sold on November 1. 1974. was sold for $22.000 under market value. and the second house. sold on July 7. 1977. was undervalued $42.500. App. at 78-81.

labor peace payoffs. Indeed, the district court held that even during his terms of incarceration, Anthony Provenzano was able to influence Union activities.

V.

Having held that the Provenzano Group was an "enterprise" for purposes of section 1962(c), the district court went on to hold that the Provenzano Group individual defendants violated that section by conducting or participating in the affairs of the Provenzano Group enterprise through a pattern of racketeering activity. App. at 146. Apart from their argument that the Provenzano Group is not an ongoing enterprise, *see supra* Part IV.B., the defendants do not dispute the district court's finding that the individual Provenzano Group defendants

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At trial, both sides presented expert witnesses to testify as to the market value of the two houses in question at the time of the sale. The defendants argue that the district court's finding is clearly erroneous because, in reaching it, the district court relied entirely on the government's expert witness and discounted the testimony of the defendants' expert. Our reading of the record reveals, however, that the district court did not adopt wholesale the testimony of the government's expert witness. With regard to the first transaction the district court held: "Eliminating certain contested aspects of each appraiser's report, and averaging the remaining minor differences I find that the approximate value of 531 Palm Drive on the purchase date as $174.000 [the sales price was $152.000]. App. at 80. Respecting the second purchase, the district court concluded: "Again using the most credible portion of both appraisers' reports, I find that this property was in fact worth $222.500 at that time, a 'benefit' for Anthony Provenzano of 42.500." *Id.*

Moreover, we note that even if the district court decided to discount entirely the credibility of the defendants' appraiser, such a credibility decision, except under extreme circumstances, should not be disturbed on review by an appellate court. *See* Anderson v. City of Bessemer, ___ U.S. ___ 105 S.Ct. 1504 (198-5).32. *See supra* discussion typescript at 51-53.

conducted the affairs of the Provenzano Group through a pattern of racketeering activity. As we have taken pains to point out, while this finding is supported by the record, and is not clearly erroneous, it nevertheless does not advance the RICO claim charged by the government. However, the district court did make individualized findings of guilt on the part of each Provenzano Group defendant. These findings fully support liability under the government's original theory -- to wit, that the relevant "enterprise" was Local 560. However it structured its analysis, there is no question that the district court found, in substance, that the individual Provenzano Group defendants violated section 1962(c) by conducting the affairs of Local 560 through a pattern of racketeering -- particularly in view of its related holding pursuant to section 1962(b). Further, it is not disputed that Local 560 is an enterprise under section 1961(4). Accordingly, we affirm the district court's finding that the Provenzano Group defendants violated section 1962(c).

The district court not only held that the Provenzano Group individuals[34] and the Executive Board members violated section 1962(b), *see supra* Part III, but it further found that both the Provenzano Group individuals and the Executive Board members conspired to violate 1962(b), in contravention of section 1962(d).[35] The district court held, in part, that

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34. *See supra* discussion typescript at 51-53.

35. *See supra* n. 4 for the text of 18 U.S.C. § 1962(d).

Although the district court, in the concluding paragraph of its opinion, stated that "the individual defendants herein have violated 18 U.S.C. § 1962(b), (c), and (d)," app. at 154, the district court clearly did not intend to hold that *each* defendant violated §§ 1962(b), (c), and (d). As we previously observed, the *Provenzano Group defendants* were found by the district court to have violated

section 1962(d) contained a state of mind requirement, separate and apart from the state of mind required for the commission of the predicate offenses, and that the Group and Board individual defendants satisfied the section 1962(d) state of mind requirement. App. at 139-140. Moreover, the district court held that under section 1962(d), the government need not demonstrate that the defendants performed an "overt act" (in addition to the two requisite RICO predicate offenses) in furtherance of the conspiracy. App. at 138. *See also United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981). In this appeal, the defendants do not contest these conclusions. We therefore affirm the holding of the district court respecting the section 1962(d) conspiracy charges.

VI.

The district court, to remedy the abuses of the Provenzano Group and the Executive Board, and to ensure that the Local 560 members will be able to exercise fully their democratic rights, ordered that the Executive Board be removed from office and replaced with a temporary trustee. The defendants argue that the district court had no power to remove the Executive Board or to establish a trusteeship. The government responds that such an equitable remedy was well

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section 1962(b), (c), and (d), having violated 1962(d) by conspiring to violate both section 1962(b) and 1962(c). App. at 6-7. However, the district court did not find that the *Executive Board defendants* violated § 1962(c), or conspired to violate that section under § 1962(d). Nor did the government make such allegations. App. at 174. Rather, the government alleged, and the district court found, that the Executive Board defendants violated § 1962(b), and conspired to violate § 1962(b), in contravention of § 1962(d). App. at 148, 174-75, 185. Thus, the district court's March 16, 1984 order reciting that the *Executive Board members* violated §§ 1962(b), (c), and (d). App. at 157, misstated the record with respect to the § 1962(c) violation.

within the discretion and power of the district court.

Section 1964(a)[36] of the RICO Act enables the district court, in its discretion, to employ a wide range of civil remedies. In relevant part, section 1964(a) empowers district courts to prevent violations of section 1962 "by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise: [and] imposing reasonable restrictions on the future activities or investments of any person . . . ." Clearly, the district court's injunction in the instant case fell within its broad remedial powers of "divestiture" and "reasonable restrictions" provided for under section 1964. Indeed, the House Report which accompanied the proposed RICO Act stated that

> [Section 1964(a)] contains broad provisions to allow for reform of corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.

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36. 18 U.S.C. § 1964(a), the civil remedies provision of RICO, provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise: imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

H. R. Rep. No. 91-1549, 91st Cong. 2nd Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4043. Moreover, we take careful note of the Supreme Court's instruction in *Sedima v. Imrex Co. Inc.*, *supra*,[37] regarding the interpretation of the RICO Act. The Court in *Sedima* held that:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, *see United States v. Turkette*, 452 U.S. 576, 586-87 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947.

105 S.Ct. at 3286.

The defendants, relying on *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), argue that removal of the Executive Board members was, in essence, a forfeiture.

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37. Recognizing that the Supreme Court had pending before it two civil RICO cases which potentially bore on issues present in these appeals, we withheld our disposition of this case until after the Supreme Court filed Sedima v. Imrex Co., Inc., ____ U.S. ____, 105 S. Ct. 3275 (1985) and Haroco, Inc. v. American National Bank and Trust Co., ____ U.S. ____, 105 S. Ct. 3291 (1985). As previously noted, *supra* at n. 27, *supra*, the Supreme Court affirmed the Seventh Circuit's *Haroco* decision, holding that a claim under § 1962(c) requires only that the plaintiff suffer damages from the predicate acts themselves, and not from the fact that the acts were performed as part of the conduct of an enterprise. In *Sedima*, the Supreme Court reversed the Second Circuit, holding that a plaintiff need not prove a "racketeering injury" in order to maintain a claim under § 1962(c).

We asked counsel to submit supplementary memoranda commenting on the impact, if any, of *Sedima* and *Haroco* on the issues presented here. Throughout this opinion we have discussed relevant aspects of both *Sedima* and *Haroco* as they affect particular issues in this appeal.

which can only be imposed under the criminal remedy provision of RICO-section 1963(a).[38] However, in *Rubin*, the court did not hold that the removal of union officers is impermissible under section 1964. Indeed, the court stated that under section 1964 (unlike section 1963) defendants may be enjoined from *reacquiring* union office. Logic dictates that if section 1964 grants the district court the authority to bar an individual from *reacquiring* office - it must also grant the district court the authority to remove an individual from office. Thus, in many ways, section 1964 is a more powerful provision than its criminal counterpart, section 1963. This is largely explained by the fact that, under section 1963, the forfeiture sanction attaches automatically, while under section 1964, the injunctive powers are left to the equitable discretion of the district court.[39]

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38. U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

39. Finally, the defendants argue that, by appointing a trustee to be in charge of Local 560, the district court forced the membership, which had not violated the RICO Act, to forfeit its interest in the union. Defendants maintain that it is impermissible to punish a party under section 1964(a) if that party has not been found to have violated the Act.

The membership of Local 560 however, is not being punished by the district court's injunction. The district court concluded, and, by this opinion, we have affirmed that conclusion, that the membership no longer controls the union. By appointing a

VII.

The order of the district court dated March 16, 1984 will be affirmed in all respects. The stay pending appeal ordered by the district court in paragraph 7[40] of its March 16, 1984 order is dissolved. The case will be remanded to the district court for further proceedings consistent with the foregoing opinion.

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temporary trustee, the district court was therefore protecting rather than forfeiting the members' rights. Moreover, as we have observed, the power to appoint a Trustee falls within the broad equitable powers granted to district courts under section 1964(a). *See generally*, Lewis v. Kugler, 446 F.2d 1343, 1351 n.18 (3rd Cir. 1971).

40. Paragraph 7 of the district court's March 16, 1984 order reads:

> 7. That the effect of the injunctive relief ordered herein, together with the naming of the trustee(s), is stayed pending appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-5333

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,
SALVATORE PROVENZANO, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J. W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC.
SALVATORE PROVENZANO, Employee Trustee,
THOMAS REYNOLDS, SR., Employee Trustee
LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN,
SALVATORE PROVENZANO, Trustee and Administrator,
JOSEPHINE P. SEPTEMBRE, Trustee and Administrator
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually

Salvatore Provenzano, Joseph Sheridan, Jay Dildine, Josephine Provenzano, Thomas Reynolds, Michael Sciarra and Stanley Jaronko,
Appellants

A-204

No. 84-5334

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen,
and Helpers of America,
SALVATORE PROVENZANO, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J. W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee
TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE
FUND, INC.
SALVATORE PROVENZANO, Employee Trustee,
THOMAS REYNOLDS, SR., Employee Trustee,
LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE
PAY PLAN,
SALVATORE PROVENZANO, Trustee and
Administrator,
JOSEPHINE P. SEPTEMBRE, Trustee and
Administrator
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually
LOCAL UNION NO. 560
Appellants

On Appeal from the District Court
for the District of New Jersey
D.C. Civil No. 82-0689

Present: GARTH and BECKER, *Circuit Judges,*
and ROSENN, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel February 12, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 19, 1984, be, and the same is hereby affirmed. It is further ordered and adjudged that the stay pending appeal ordered by the said District Court in paragraph 740 of its March 16, 1984 order is dissolved. It is further ordered that the cause be remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellants.

ATTEST:

Clerk

December 26, 1985

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-5333

UNITED STATES OF AMERICA
v.
LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,
SALVATORE PROVENZANO, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J. W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC.
SALVATORE PROVENZANO, Employee Trustee,
THOMAS REYNOLDS, SR., Employee Trustee
LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN,
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JOSEPHINE P. SEPTEMBRE, Trustee and Administrator
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually

Salvatore Provenzano, Joseph Sheridan, Jay Dildine, Josephine Provenzano, Thomas Reynolds, Michael Sciarra and Stanley Jaronko,
Appellants

No. 84-5334

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,
SALVATORE PROVENZANO, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
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THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC.
SALVATORE PROVENZANO, Employee Trustee,
THOMAS REYNOLDS, SR., Employee Trustee,

LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN,
SALVATORE PROVENZANO, Trustee and Administrator,
JOSEPHINE P. SEPTEMBRE, Trustee and Administrator
ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually

LOCAL UNION NO. 5[illegible]

Appellants

On Appeal from the District Court
for the District of New Jersey
D.C. Civil No. 82-0689

Present: ALDISERT, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON MANSMANN , *Circuit Judges*, and ROSENN, *Senior Circuit Judge*

SUR JOINT PETITION FOR REHEARING

The petition for rehearing filed by appellants, Local 560 Executive Board Members and Local Union 560, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the joint petition for rehearing is denied.

By the Court

Circuit Judge

DATED: JAN. 23, 1986

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5333

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters. Chauffeurs. Warehousemen. and Helpers of America. SALVATORE PROVENZANO. President. JOSEPH SHERIDAN. Vice-President. JOSEPHINE PROVENZANO SEPTEMBRE. Sec-Treasurer. J.W. DILDINE. Recording Secretary. THOMAS REYNOLDS. SR.. Trustee. STANLEY JARONKO. Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND. INC.
SALVATORE PROVENZANO. Employee Trustee.
THOMAS REYNOLDS. SR.. Employee Trustee
LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN.
SALVATORE PROVENZANO.
Trustee and Administrator.
JOSEPHINE P. SEPTEMBRE.
Trustee and Administrator
ANTHONY PROVENZANO. individually.
NUNZIO PROVENZANO. individually.
STEPHEN ANDRETTA. individually.
THOMAS ANDRETTA. individually.
GABRIEL BRIGUGLIO. individually.

Salvatore Provenzano. Joseph Sheridan. Jay Dildine. Josephine Provenzano. Thomas Reynolds. Michael Sciarra and Stanley Jaronko.

Appellants

A-210

No. 84-5334

UNITED STATES OF AMERICA

v.

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, SALVATORE PROVENZANO, President
JOSEPH SHERIDAN, Vice-President
JOSEPHINE PROVENZANO SEPTEMBRE, Sec-Treasurer,
J.W. DILDINE, Recording Secretary,
THOMAS REYNOLDS, SR., Trustee,
STANLEY JARONKO, Trustee

TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC., SALVATORE PROVENZANO, Employee Trustee, THOMAS REYNOLDS, SR., Employee Trustee

LOCAL 560 OFFICERS AND EMPLOYEES SEVERANCE PAY PLAN, SALVATORE PROVENZANO, Trustee and Administrator, JOSEPHINE P. SEPTEMBRE, Trustee and Administrator, ANTHONY PROVENZANO, individually,
NUNZIO PROVENZANO, individually,
STEPHEN ANDRETTA, individually,
THOMAS ANDRETTA, individually,
GABRIEL BRIGUGLIO, individually
LOCAL UNION NO. 560,

Appellants

On Appeal from the District Court
for the District of New Jersey
D.C. Civil No. 82-0689

Argued February 12, 1985

BEFORE: GARTH and BECKER, *Circuit Judges*,
and ROSENN, *Senior Circuit Judge*

(Opinion filed December 26, 1985)

ORDER AMENDING OPINION

IT IS ORDERED, that the slip opinion in the above matter is hereby amended as follows:

1. On page two, line 13: delete the "7" between the words "Cohen" and "Solomon" and insert an "&".
2. On page four, 14 lines from the bottom: do not capitalize "ET SEQ., BY THE".
3. On page 13, 11 lines from the bottom: the word "Antohny" should be "Anthony".
4. On page 23, 16 lines from the bottom: the word "testifed" should be "testified".
5. On page 29, in footnote 14, line 5 of the quoted material: the nord "erson" should be "person".
6. On page 42, line 15 from the top: the word "testimonty" should be "testimony".
7. On page 43, line 19 from the top: the word "freightways" should be capitalized.
8. On page 53, line three: the word "local" should be capitalized.

9. On page 53, in footnote 30, three lines from the bottom: the word "statement" should be "statements".

10. On page 55, in footnote 31, 15 lines from the bottom: there should be a period after the word "other."

By the Court,

/s/ Leonard I. Garth

Circuit Judge

Dated: February 3, 1986

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

TITLE 29, UNITED STATES CODE, SECTION 411(a)(1) & (2)

§411(a)(1) & (2). Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights: Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly: Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractural obligations.

TITLE 29, UNITED STATES CODE, SECTION 501(a)

§501(a). Fiduciary responsibility of officers of labor organizations

(a) Duties of officers; exculpatory provisions and resolutions void: The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

TITLE 29, UNITED STATES CODE, SECTION 504

§504. Prohibition against certain persons holding office

(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.:

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter

III or IV of this chapter, or conspiracy to commit any such crime, shall serve —

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or,

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee of (other than as an employee performing exclusively clerical or custodial duties) any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice that such person's service in any capacity referred to in clauses (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, County, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office in violation of this subsection.

(b) Penalty for violations:

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(c) Definitions:

For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction"

from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

(Pub. L. 86-257, title V, § 504, Sept. 14, 1959, 73 Stat. 536) (Since amended, Pub. L. 98-473, Title II, § 803, Oct. 12, 1984, 98 Stat. 2133.)

Supreme Court, U.S.
FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1448 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 560 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
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20 pp

QUESTIONS PRESENTED

1. Whether preponderance of the evidence is the proper standard of proof in this civil proceeding under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (& Supp. II) 1964.

2. Whether the criminal provision in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 530, precludes a prosecution under the Hobbs Act, 18 U.S.C. 1951, for extortion of union members' rights.

3. Whether petitioners were properly found to have aided and abetted Hobbs Act violations.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1448

LOCAL 560 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A138-A202) is reported at 780 F.2d 267. The post-trial opinion of the district court (Pet. App. A28-A135), setting forth its findings of fact and conclusions of law, is reported at 581 F. Supp. 279. The pretrial opinion of the district court (Pet. App. A1-A27), denying defendants' motion to dismiss, is reported at 550 F. Supp. 511.

JURISDICTION

The judgment of the court of appeals (Pet. App. A203-A205) was entered on December 26, 1985. A petition for rehearing was denied on January 23, 1986 (Pet. App. A206-A208). The petition for a writ of certiorari was filed on February 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action commenced by the United States pursuant to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. II) 1964. In pertinent part, the complaint sought an order removing petitioners Josephine Provenzano, Michael Sciarra, Stanley Jaronko, and Joseph Sheridan from their positions on the executive board of Local 560 of the International Brotherhood of Teamsters pending the democratic election of officers by the union membership. The government also sought the appointment of a receiver or trustee to serve as the executive board of Local 560 until the union membership could select officers in fair elections. Following a 51-day bench trial, the district court granted the requested injunction and ordered that a trusteeship be established to replace the executive board members pending free and supervised union elections (Pet. App. A28-A135, A136-A137).[1] The court of appeals affirmed (*id.* at A138-A202).

1. The complaint alleged that the "Provenzano Group" —including defendants Anthony Provenzano, Nunzio Provenzano, Steven Andretta, Thomas Andretta, and Gabriel Briguglio—violated 18 U.S.C. 1962(b) by using extortion and murder to acquire an interest in and control of Local 560, an "enterprise" under the RICO statute. The complaint also alleged that the Provenzano Group participated in the affairs of Local 560 through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Finally, the complaint charged that the Provenzano Group engaged in a conspiracy to violate RICO under 18 U.S.C. 1962(d).

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[1]The district court's order has been stayed pending appellate review (Pet. App. A137, A213).

The remaining seven defendants—including petitioners Josephine Provenzano, Sciarra, Jaronko, and Sheridan—were alleged to have aided and abetted the Provenzano Group in its unlawful control of Local 560, in violation of 18 U.S.C. 1962(b) and 2, and to have conspired to control the union, in violation of 18 U.S.C. 1962(d). Josephine Provenzano, the daughter of defendant Anthony Provenzano and the niece of defendants Salvatore and Nunzio Provenzano, has been the secretary-treasurer of the union since June 1978. Sciarra, who was formerly employed by the union as a business agent, became a trustee of Local 560 in May 1981 and is now the president of Local 560. Jaronko, also a former business agent of Local 560, has been a trustee since 1981. Sheridan has been the vice-president of the union since July 1981 and previously served as a union trustee and business agent. Pet. 5; Pet. App. A41-A42.

2. The government's voluminous evidence at trial is described in the opinion of the district court. In brief, it established that the Provenzano Group acquired and maintained control over Local 560 through "a pervasive climate of intimidation" (Pet. App. A89) that had an "intens[e] * * * impact upon the [union]" (*id.* at A96). In particular, members of the Provenzano Group (1) assaulted or murdered persons who opposed their control of the union, (2) appointed and reappointed criminals and persons with records of violence to positions of authority within the union, (3) encouraged the presence of known or reputed criminals at the union's offices, (4) extorted payments from employers in exchange for labor peace, (5) accepted bribes and kickbacks for engaging in conduct detrimental to the interests of union members, and (6) received improper payments from the union treasury (*id.* at A77-A94, A132-A133).

The evidence also established that petitioners aided and abetted members of the Provenzano Group in their efforts to control Local 560 through intimidation and fear. Josephine Provenzano was promoted at the age of 23 from her position as an office worker to fill the vacancy on the executive board after her father was convicted of murder; her primary allegiance on the board was to her father (Pet. App. A41, A51-A53). Sciarra, who also was allied with the Provenzanos, permitted a Provenzano Group associate to supply non-union truck drivers to an employer under contract with Local 560 and made no attempt to organize those employees (*id.* at A69-A72). Jaronko, who was likewise "fiercely loyal to the Provenzanos" (*id.* at A54), ignored "the history of criminal activity on the part of various individuals" associated with the union, including the Provenzanos (*ibid.*); in addition, in 1983 Jaronko assaulted a union member who publicly criticized Salvatore Provenzano (*id.* at A88-A89, A101-A102). Sheridan supported the Provenzanos' interests within the union notwithstanding their criminal convictions, and he took the position that organized crime figures were not involved in the union's affairs (*id.* at A63-A69). Furthermore, Sciarra, Jaronko, and Sheridan testified at trial that they would reappoint members of the Provenzano Group to positions in the union if circumstances permitted (*id.* at A104).

The evidence further showed that in 1981 these petitioners, as members of the executive board of Local 560, appointed Robert Luizzi as a business agent despite his prior convictions for crimes of violence and indications that he had solicited payoffs or bribes for labor peace from a trucking company that had a contract with the union (Pet. App. A93). Petitioners also approved the payment to Anthony Provenzano of pension monies even though the payments provided no discernible benefit to the union membership. In addition, petitioners acquiesced in Nunzio

Provenzano's retention of his position as president of the union following his labor racketeering conviction, and they then appointed Salvatore Provenzano to be president of the union even though he had previously served as president during a period when the Provenzano Group had committed labor racketeering violations (*id.* at A95-A96; see also *id.* at A132-A133).

3. On this record, the district court found that petitioners had aided and abetted the Provenzano Group in acquiring and maintaining control over Local 560, in violation of 18 U.S.C. 1962(b) and 2. See Pet. App. A131, A133.[2] In addition, the court concluded that Local 560 "continues to be a captive labor organization, which the Provenzano Group has dominated through fear and intimidation and has exploited through fraud and corruption" (*id.* at A100), that these illegal activities "are likely to reoccur as long as Local 560 remains a captive labor organization" (*ibid.*), and that "the facts lead inescapably to the conclusion that various nominees and successors will continue the Provenzano Group's 'criminal business' as usual" (*id.* at A100-A101). Specifically, the court found that Josephine Provenzano was appointed to the executive board as her father's "surrogate" (*id.* at A95) and served as "a mere nominee for her incarcerated father" (*id.* at A112). Sciarra was found to have "an involvement with the Provenzano Group, as well as a mind-set, which makes it impossible for him to analyze objectively what must be done within Local 560 to avoid a repetition of the past and to ameliorate the climate of

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[2]The district court held that the "preponderance of the evidence" standard applied in this civil RICO case (Pet. App. A116-A119). In addition, the court ruled (*id.* at A1-A27) that the misdemeanor criminal provision in the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 530, did not preempt the Hobbs Act, 18 U.S.C. 1951, by removing the extortion of union members' LMRDA rights from the reach of that statute.

intimidation within Local 560" (*id.* at A113). Jaronko, the court found, has "intense * * * feelings of loyalty towards the Provenzanos" (*ibid.*), "identifies himself closely with the Provenzanos' thirty-year history of racketeering activity within Local 560, and is steadfastly opposed to any change in the status quo" (*id.* at A114). Finally, the court found that Sheridan's loyalty to the Provenzanos "has been purchased" (*id.* at A111), and that his "blind[ness]" (*id.* at A69) to the corruption of the union made it "impossible for him to formulate and promote policies which would be reasonably calculated to prevent or discourage further racketeering activity within Local 560 and ameliorate the current climate of intimidation" (*id.* at A111).

Accordingly, in light of petitioners' role in aiding and abetting the Provenzano Group, and in order to neutralize the effects of the previous criminal activities and union intimidation, the district court directed that petitioners relinquish their executive board positions pending fair and democratic elections and that a trustee be appointed to serve as the executive board "for such time as is necessary to foster conditions under which reasonably free, supervised elections can be held, presumptively for eighteen months" (Pet. App. A137). As the court explained (*id.* at A105):

> The current Executive Board members must be removed as a predicate to the restoration of union democracy within Local 560 and to ameliorate and remedy the conditions which have enabled the associates of the Provenzano Group to dominate and exploit the Local for the past thirty years. * * *
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> Removal of each Executive Board member is also necessary because each one is either unwilling or unable to evaluate objectively the criminal conduct of fellow officers or business agents, or to institute prophylactic measures to ensure as much as possible that past criminal conduct will not be repeated.

The court thus concluded that "Local 560 will remain a captive labor organization as long as the status quo remains unchanged" (*id.* at A104) and that "[o]nly through the imposition of a trusteeship [in place of the executive board] for a curative period of sufficient length can the pattern of abuse be broken and future violations prevented" (*id.* at A115).

4. The court of appeals affirmed (Pet. App. A138-A202). First, finding that there was "ample evidence supporting the district court's subsidiary findings as well as its ultimate finding of aiding and abetting" (*id.* at A175), the court of appeals upheld the district court's determination that "the Executive Board had aided and abetted the extortionate acts" of the Provenzano Group "by (1) making certain appointments and reappointments to union offices; (2) failing to remove certain appointees from office; (3) spending union assets for Anthony Provenzano; (4) permitting access to Local 560's offices by known or reputed criminals; and (5) being recklessly indifferent to the above-mentioned systematic misconduct of fellow incumbent officers" (*id.* at A172-A173; see also *id.* at A175-A185). With particular regard to petitioners, the court of appeals observed that they "were active members of the [Executive] Board" (*id.* at A185), that each petitioner "aided and abetted in at least two predicate Hobbs Act extortions" (*id.* at A184), and that each petitioner was involved in actions to assist the Provenzano Group's control of Local 560 (*id.* at A185). Therefore, the court concluded, each petitioner "is, in his or her own right, culpable for the extortion of the membership's rights" (*ibid.*). The court of appeals thus agreed with the district court that "the Executive Board defendants knew of the[] commission [of crimes by the Provenzano Group] and demonstrated the requisite intent [to facilitate those crimes]" (*id.* at A174).

The court of appeals also sustained the district court's ruling that the proper burden of proof in this civil RICO case is the "preponderance of the evidence" standard (Pet. App. A163-A165 n.12). In addition, the court held that 29 U.S.C. 530 is not the exclusive criminal sanction for violating union members' LMRDA rights and that the extortion of such rights falls within the reach of the Hobbs Act (Pet. App. A169-A172). The court further concluded that petitioners' conduct, even if not independently unlawful under federal labor law, could constitute activity that aided and abetted the Provenzano Group's Hobbs Act violations (*id.* at A179-A180). Finally, the court found that petitioners' conduct was not legitimated by any votes of the union membership in view of the "intimidation and fear leading to coerced judgments on the part of Local members" (*id.* at A183 n.22).

ARGUMENT

In extensive opinions upon which we rely, the district court and the court of appeals correctly rejected the arguments raised by petitioners. The decision below does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Petitioners contend (Pet. 10-17) that the courts below erred in holding that the standard of proof in this civil RICO case is "preponderance of the evidence." This contention is without merit. Furthermore, as petitioners acknowledge, the cases in which this burden-of-proof issue has arisen "are few in number" (Pet. 11), and petitioners do not allege that the court of appeals' ruling is inconsistent with the decisions of those other courts (see Pet. App. A163 n.12; see also *id.* at A118).

This Court has recognized that "the preponderance-of-the-evidence standard [is] generally applicable in civil actions." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 (1983) (footnote omitted). With specific reference

to the burden of proof in civil RICO cases, the Court recently noted that "[t]here is no indication that Congress sought to depart from this general principle." *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 11.[3]

Petitioners' argument for applying a higher burden of proof notwithstanding *Herman & MacLean* and *Sedima* is unconvincing. Petitioners contend (Pet. 15) that civil RICO actions are "akin to criminal proceedings" because they require a showing that the defendant engaged in criminal racketeering activity. But as the Court explained in *Sedima* (slip op. 11), "[i]n a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. * * * That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards * * *." See also, *e.g.*, *Herman & MacLean*, 459 U.S. at 389-390; *United States* v. *Regan*, 232 U.S. 37, 47-49 (1914). Moreover, the potential "stigma" (Pet. 15) that petitioners assert will result for defendants in civil RICO cases does not support a higher standard of proof; "[a]s for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings" (*Sedima*, slip op. 12), and it is well settled that the preponderance standard generally governs federal statutory causes of action involving fraud or other wrongful conduct. See, *e.g.*, *Herman & MacLean*, 459 U.S. at 390. Likewise, contrary to petitioner's contention (Pet. 15), the provision in RICO for treble damages affords no more reason to apply a higher burden of proof here than in civil suits under the federal antitrust laws, where treble

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[3]The Court in *Sedima* discussed at length the question of the burden of proof in civil RICO suits but found it unnecessary to the disposition of that case to "decide the standard of proof issue today" (slip op. 11).

damages have long been authorized.[4] In any event, damages were not sought in this equitable action, so any argument for imposing a higher standard of proof in treble damage cases would not apply here. Finally, petitioners' argument ignores the countervailing interest of civil RICO plaintiffs—"the very individuals Congress sought to protect"—in obtaining relief if "they [can] prove that it is more likely than not that [the defendant committed a civil RICO violation]" (*Herman & MacLean,* 459 U.S. at 390).[5]

2. Petitioners were found to have violated the RICO statute, 18 U.S.C. 1962(b), by aiding and abetting the Provenzano Group's control over Local 560 through extortion of the union members' rights under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411. The acts of extortion that petitioners aided and abetted were alleged to constitute violations of the Hobbs Act, 18 U.S.C. 1951; those Hobbs Act violations in turn served as the predicate acts of racketeering for petitioners' RICO violation. Petitioners contend (Pet. 17-24) that the misdemeanor provision in the LMRDA, 29 U.S.C. 530, is the exclusive criminal sanction for interference with union members' LMRDA rights and precludes the application of

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[4]Indeed, the civil RICO provision for treble damages was specifically modeled on the federal antitrust laws. See *Sedima,* slip op. 7-8, 9-10 & n.8.

[5]Petitioners' reliance (Pet. 12-14) on *Santosky* v. *Kramer,* 455 U.S. 745 (1982), and *Addington* v. *Texas,* 441 U.S. 418 (1979), is misplaced. Those decisions require a higher burden of proof where, unlike in this case, "particularly important individual interests or rights are at stake," such as a "proceeding to terminate parental rights" or an "involuntary commitment proceeding" (*Herman & MacLean,* 459 U.S. at 389). See also *id.* at 390 (preponderance standard applies in civil fraud proceeding in which defendant can be permanently barred from practicing his profession).

the Hobbs Act to the extortion of those labor rights.[6] Both courts below rejected this contention (see Pet. App. A18-A26, A169-A172), and petitioners acknowledge (Pet. 19) that this is the only court of appeals decision addressing the question.

Initially, it is not at all clear that 29 U.S.C. 530 extends to the extortionate conduct in this case. Entitled "[d]eprivation of rights by violence," Section 530 prevents interference with LMRDA rights "through the use of force or violence, or threat of the use of force or violence." As the lower courts explained, Section 530 "is essentially [an] assault and battery [statute]" (Pet. App. A20) and "prohibit[s] physical assaults on [union] members" (*id.* at A170). Extortion, on the other hand, does not require the direct use of violence against individual union members and can be effected through nonviolent acts. In fact, in contrast to such physical force, the extortionate conduct in this case involved "more sophisticated and indirect physical and economic threats" (*id.* at A172) and largely consisted of a general atmosphere of fear not only of physical harm but also of "economic harm, particularly the loss of the ability to earn a livelihood" (*id.* at A86; see also *id.* at A97, A129). Thus, Section 530 is not specifically "an extortion statute" (Pet. App. A22), and "[t]he Hobbs Act, much more so than section 530, is designed to combat extortion" (*id.* at A172).

In any event, assuming that Section 530 is applicable here, it would not displace the Hobbs Act. It is undisputed that, absent Section 530, the extortionate conduct at issue in this case would fall within the reach of the Hobbs Act. It is also clear that nothing on the face of Section 530 suggests that it was meant to limit or preempt any provision of the

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[6] 29 U.S.C. 530 is not a racketeering activity for purposes of RICO. See 18 U.S.C. (Supp. II) 1961(1).

Hobbs Act that would otherwise apply. On the contrary, Congress declared that the LMRDA is "further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally" against "breach of trust, corruption, [and] disregard of the rights of individual employees * * *." 29 U.S.C. 401(b). In addition, the LMRDA contains a broad savings clause that expressly states that "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under * * * other Federal law or law of any State." 29 U.S.C. 523(a).[7] These statutory provisions make clear that Section 530 is not the exclusive sanction for LMRDA violations and does not preclude application of the Hobbs Act.

Petitioners' argument is, in substance, that Section 530 impliedly repeals the Hobbs Act with respect to extortion of union members' LMRDA rights. But it is a " ' "cardinal rule * * * that repeals by implication are not favored." ' " *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (citation omitted). In this case, where there is neither a " 'clear and manifest' " congressional intention to repeal the Hobbs Act nor a " 'positive repugnacy' " and " 'irreconcilable' " conflict between the two statutes (*id.* at 189-190 (citations omitted)), Section 530 cannot be taken to displace the Hobbs Act. See also *United States* v. *Gilliland*, 312 U.S. 86, 95-96 (1941).

Finally, the fact emphasized by petitioners that Section 530 provides a lesser penalty than the Hobbs Act (Pet. 20-24) does not indicate that Section 530 was intended to be the exclusive sanction and to preclude application of the Hobbs Act. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S.

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[7]We note that while this lawsuit was brought by the government, petitioners' argument would equally mean that adversely affected union members could not sue under civil RICO.

114, 123-125 (1979); *Gilliland,* 312 U.S. at 95-96.[8] "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either * * *. Whether to prosecute and what charge to file * * * are decisions that generally rest in the prosecutor's discretion" (*Batchelder,* 442 U.S. at 123-124).

In sum, the LMRDA does not suggest that the misdemeanor provision in 29 U.S.C. 530 restricts or supplants the generally applicable felony provision in the Hobbs Act. Likewise, the legislative history cited by petitioners does not indicate that Congress intended to render the Hobbs Act inapplicable to the extortion of union members' LMRDA rights. Compare *Busic* v. *United States,* 446 U.S. 398 (1980). In these circumstances, petitioners' conduct in aiding and abetting the Provenzano Group's extortion was properly alleged to violate the Hobbs Act.[9]

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[8]Petitioners concede (Pet. 19) that the sanctions authorized by Section 530 are "relatively mild."

[9]Petitioners' argument contests the validity of the district court's determination that they violated the RICO statute, 18 U.S.C. 1962(b), by aiding and abetting the Provenzano Group's Hobbs Act extortion of the rights of members of Local 560. But even if petitioners' aiding and abetting were not chargeable under the Hobbs Act and hence not a violation of RICO, their removal from the union's executive board pending fair elections—which is the relief ordered against them by the district court's judgment—would nevertheless be proper because of petitioners' relationship to and control by the Provenzano Group. The court found that Josephine Provenzano is "a mere nominee for her incarcerated father" (Pet. App. A112) and that her "love for her father transcends everything else" (*id.* at A53); that Sciarra is unable "to analyze objectively what must be done within Local 560 to avoid a repetition of the past and to ameliorate the climate of intimidation within Local 560" (*id.* at A113); that Jaronko is "fiercely loyal to the Provenzanos" and his "fealty to the present regime is steadfast beyond question" (*id.* at A54); and that Sheridan had been "bought" (*id.* at A69) and "his loyalty has been purchased" (*id.* at A111). Based on this record, the court determined that "Local 560 will remain a captive labor organization as long as the status quo remains unchanged" (*id.* at A104), and

3. Finally, petitioners argue (Pet. 24-26) that their actions could not support a finding that they aided and abetted the Hobbs Act violations because their conduct, standing alone, would not have violated the LMRDA. However, it is commonplace that acts not in themselves illegal can aid and abet the commission of a crime. Beyond that, the fact that petitioners' activities were not independently violative of one statute—the LMRDA—does not serve to excuse that conduct if it violated another statute—the Hobbs Act. Thus, even if petitioners had been charged as principals in the Hobbs Act violations, it would have been no defense to the charges of extortion that they had not also violated the LMRDA. *A fortiori,* where petitioners were charged as aiders and abettors, it was sufficient to find, as both courts below did, that petitioners "knew of the[] commission [of the Hobbs Act offenses by the Provenzano Group] and demonstrated the requisite intent [to facilitate them]" (Pet. App. A174).[10]

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therefore that "[o]nly through the imposition of a trusteeship for a curative period of sufficient length can the pattern of abuse be broken and future violations prevented" (*id.* at A115). Accordingly, the court ruled that "[t]he current Executive Board members must be removed as a predicate to the restoration of union democracy within Local 560 and to ameliorate and remedy the conditions which have enabled the associates of the Provenzano Group to dominate and exploit the Local for the past thirty years" (*id.* at A105). Thus, whether or not petitioners aided and abetted labor extortion in violation of the Hobbs Act, their involvement with the Provenzano Group justified their removal from union office in the exercise of the district court's broad remedial power under 18 U.S.C. (& Supp. II) 1964 to eliminate the corruption and intimidation of Local 560 and to restore union democracy.

[10]To the extent that petitioners seek to raise what they acknowledge to be a "very fact specific" (Pet. 26) challenge to the aiding-and-abetting finding concurred in by both courts below, their contention does not call for this Court's review (see *United States* v. *Doe,* 465 U.S. 605, 613-614 (1984)). In any event, that claim is without merit for the reasons previously discussed. Petitioners' suggestion (Pet. 24, 25) that the vote

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1986

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of the union membership served to ratify their acts is "unpersuasive in light of the district court's findings of intimidation and fear leading to coerced judgments on the part of Local members" (Pet. App. A183 n.22).

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